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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice*, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M. NATESAN.

The Chief Controlling Revenue Authority, Madras, Board of Revenue, Madras-5, Referring Officer .. *Petitioner**

v.

The Canara Industrial and Banking Syndicate, Limited, Madras and others .. *Respondents.*

Stamp Act (II of 1899), *Article* 23, *Schedule I—Conveyance—Instrument styled as receipt bearing stamps of ten naye paise—Duly signed and containing words conveying immoveable properties—Instrument " executed "—Liable to be stamped as a conveyance—" Executed " " chargeable "—Words and phrases—Instrument " executed " and not "executed "—Distinction.*

A person sold properties, namely, Rice, Flour etc. Mill together with their accessories for Rs. 17,000 to another. The instrument is styled as receipt and is written on plain paper, bearing revenue stamp of the value of ten naye paise. It is admitted that the land and the buildings in which the Rice and Flour Mills and the appurtenant machinery were installed were separately sold between the same persons by a registered sale deed of the same date as the receipt. The properties sold for Rs 17,000 were embedded and attached to the earth and it is not in dispute that the instrument " receipt " really relates to the sale of immovable properties. It was the contention of the respondent that notwithstanding the above fact, the instrument, was not a valid conveyance and could not be held liable to stamp duty under Article 23 of Schedule I to the Stamp Act. In a Reference to the High Court by the Chief Controlling Revenue Authorities, Madras, under section 57 of the Stamp Act,

Held: The document is liable for stamp duty under Article 23 of Schedule I to the Act as a conveyance. Having regard to the definitions of "chargeable," and "executed" the document has to be considered as chargeable with stamp duty when it is executed. Once a document is complete in execution in the sense, the parties and attestors had signed the same and the effective words of disposition are there, immediately transferring rights, by the very terms of the document the document is certainly liable to stamp duty with reference to the relevant article of the Stamp Act since execution is complete, the question of subsequent registration is a distinct matter altogether.

* Ref. C. Nos. 12, 13 and 17 of 1965. 17th April, 1967.

Where the documents required by law to be attested was not attested, this document would not be "executed" document at all within the scope of relevant definitions of the Stamp Act and hence is not complete document purporting to transfer rights and hence no question of stamp duty would arise.

Cases referred to the High Court by the Chief Controlling Revenue Authority, Madras, under section 57 of the Indian Stamp Act, 1899, in the matter of instruments, dated 31st July, 1963, 15th November, 1958 and 31st October, 1963 respectively executed by the Canara Industrial Banking Syndicate, Ltd, Madras and the Venus Oil and Fertilisers (P) Ltd by O R Gopalachari, and O G. Parvathavardhani Ammal in favour of S R S Subramanian and by the Canara Industrial and Banking Syndicate, Ltd, Salem and the Premier Roller Flour Mills Ltd, Salem-2, regarding the duty chargeable on the said instruments on his file on the following questions of law in Referred Case Nos 12, 13 and 17 of 1965 respectively, namely —

"(i) Whether the instrument in question is liable to be stamped even if it were not to be attested and whether instruments in general are to be stamped on execution notwithstanding that other conditions which validate the transfer of rights which the instrument purports to make are not present. Whether the instrument in question is chargeable as a mortgage-deed under Article 40 (*b*) of Schedule I of the Indian Stamp Act, and

(ii) Whether the instrument in question is not liable to be stamped under Article 23 of Schedule I of Stamp Act even though it is not registered and whether instruments in general are to be stamped on execution notwithstanding that other conditions which validate the transfer of rights which the instrument purports to make are not present; and

(iii) Whether the instrument in question is not liable to be stamped under Article 40 (*b*) of Schedule I, to the Stamp Act even though it is not registered and attested and whether instruments in general are to be stamped on execution notwithstanding that other conditions which validate the transfer of rights which the instrument purports to make are not present."

Additional Government Pleader (*V Ramaswami*), for Referring Officer.

M. L. Nayak, R Gopalaswamy Ayyangar, K Venkatasami, K Alagiriswami and *S. Jagadisan,* for Respondents.

The Order of the Court was pronounced by

Anantanarayanan, C J.—These references under section 57 of the Indian Stamp Act, 1899, are closely inter-related in the substantial question involved, namely, what was precisely decided in *Crompton Engineering Co., Ltd* v *Chief Controlling Revenue Authority, Madras*[1], and how far should the dicta in that judgment be pressed with regard to an unregistered instrument, which, but for registration, is effective to transfer rights as a conveyance or a deed of mortgage? Of the three references, Referred Case No. 13 of 1965 is the most significant, on the facts, and the arguments were really elaborated in this case. Therefore, we consider it most appropriate to deal with this reference immediately, and in detail. The question for our decision is .

"Whether the instrument in question is not liable to be stamped under Article 23 of Schedule I of Stamp Act, even though it is not registered, and whether instruments in general are to be stamped on execution notwithstanding that other conditions which validate the transfer of rights which the instruments purport to make are not present?

Before dealing with the main issue, in this select reference (Referred Case No 13 of 1965), it is essential to set forth the several definitions and provisions of the Indian Stamp Act II of 1899, as amended upto-date . No apology is, hence,

1. I.L.R. (1953) Mad 566 (F.B.) (1953) 1 M.L.J. 620.

needed for these *verbatim* citations, as the definitions and their juxtaposition have to be borne in mind, when considering the question really involved

Section 2 (6). Definition of "chargeable."

"Chargeable' means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed."

Section 2 (10). Definition of "conveyance."

"Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I (or by Schedule I-A as the case may be. .. ....)."

Section 2 (12). Definition of "executed" and "execution"

"Executed" and "execution" used with reference to instruments, mean "signed" and "signature."

Section 2 (14). Definition of "instrument."

"'Instrument' includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished, or recorded."

Section 2 (17). Definition of "mortgage-deed":

"Mortgage-deed" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of another, a right over or in respect of specified property"

Section 3.

"Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say —

(*a*) every instrument mentioned in that schedule which, not having been previously executed in India on or after the first day of July, 1899"

Section 17.

"All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution."

A very brief reference is sufficient to the relevant articles of the Stamp Act. Under Article 29 of Schedule I, a document is liable to duty as a

"conveyance as defined by section 2 (10).............. "

Section 2 (23) embodies the definition of a *Receipt* which

"includes any note, memorandum or writing—(*a*) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received.......... . . . . "

The relevant article of Schedule I is Article 53, which is

"Receipt as defined by section 2 (23) for any money or other property, the amount or value of which exceeds twenty rupees"

One other article that may be conveniently referred to here, is Article 40 relating to *mortgage-deed* of which there are two sub-divisions (*a*) and (*b*) depending upon whether possession of property is forthwith given, or is not.

The facts in Referred Case No. 1'3 of 1965 can be very briefly stated. On 15th November, 1968, O R. Gopalachari and O. G Parvathavardhani Ammal sold valuable properties, namely, rice, flour etc, mill together with their accessories, for Rs. 17,000 to S. R. S Subramanian. The instrument is styled as *receipt* and is written on plain paper, bearing revenue stamp of the value of ten naya paise. Admittedly, the land and the buildings in which the rice and flour mills and the appurtenant machinery were installed, were separately sold between the same persons, by a registered sale deed, dated 15th November, 1958, the same date. But one very important feature of the alleged receipt is that it does not, as may be considered *ex facie* from the facts, relate to the sale of movable properties. On the contrary, the properties sold for Rs 17,000 were embedded and attached to the earth, and the instrument (receipt) really relates to the sale of immovable properties; that is not in dispute.

It was contended on behalf of the respondent, on the authority of *Crompton Engineering Co, Ltd* v. *Chief Controlling Revenue Authority, Madras*[1], that, notwithstanding the above fact, that instrument not being registered, was not a valid conveyance, and could not be held liable to stamp duty under Article 23 of Schedule I of the Stamp Act. We might here note that in an earlier reference to this Court *Chief Controlling Revenue Authority* v *Madras Industrial Investment Corporation*[2]. the learned Government Pleader sought to raise the very same question, that we should now authoritatively interpret the scope of the dicta in *Crompton Engineering Co, Ltd* v. *Chief Controlling Revenue Authority, Madras*[1], or, if we accepted the argument of the learned Government Pleader on that aspect, have the decision posted for reconsideration at the hands of a Fuller Bench We then pointed out that there was no actual case before the Court at all, which involved the question, and that

"in the mere context of a hypothetical case and a document which may never eventuate."

We did not consider that the principle of *stare decisis* should be departed from. But, in the present case, there can be no doubt that the dicta in *Crompton Engineering Co., Ltd.* v. *Chief Controlling Revenue Authority, Madras*[1] do fall to be squarely considered. The learned Additional Government Pleader strenuously contends, that that decision cannot be taken as authority for the view that a document is not liable to be charged with duty, either as a conveyance or as a mortgage deed, as the case may be, merely because it is unregistered, and the law requires registration to effectuate such transfer of rights. On the contrary, he contends that any such interpretation would involve a situation which is patently opposed to the stamp law, which has always envisaged a document as being liable to stamp duty, at the time of its execution, and prior to its registration We shall dwell on this aspect for a moment for we do not think that this proposition can be seriously doubted.

The proposition that the entire stamp law envisages a document as liable to stamp duty, at the time when the instrument is executed, would appear to necessarily follow from the definition of *Chargeable* under section 2 (6), from the terms of section 3 (*a*) and also from the explicit terms of section 17 of the Stamp Act that we have set forth earlier. The matter is indeed set at rest, by the dicta of their Lordships of the Supreme Court in *New Central Jute Mills* v. *State of West Bengal*[3], though the facts of that case involved a different and, perhaps, an unique situation. That was a case in which a mortgage deed was executed in Uttar Pradesh though it related to property situate in West Bengal, and the document was received in that State for registration. The document had been stamped in accordance with the law of West Bengal but the judgment held that when the document came up before the

1. I.L.R. (1953) Mad. 566: (1953) 1 M.L.J. 620 (F.B).
2. I.L.R. (1967) 1 Mad. 1 (1966) 2 M.L.J. 320. (F.B.)
3. (1964) 1 S.C.J. 195: (1964) 1 S.C.R. 535: (1964) 1 M.L.J. (S.C.) 68: (1964) 1 An. W.R. (S.C.) 68; A.I.R. 1963 S.C. 1307.

officers of Uttar Pradesh for decision, whether it was duly stamped or not, the officers of Uttar Pradesh were bound to hold that the instrument was not duly stamped, as it did not bear Uttar Pradesh Stamps. This particular situation of a document executed in one State, and attempted to be registered in another State, does not now concern us. But the Supreme Court authoritatively held at page 1311 that,

> "Primarily, the liability of an instrument to stamp duty arises on execution."

Again,

> "It is clear that in many cases the only one liability, *viz*, the liability on execution of the document will arise After the amendment of the Act, the liability can no longer be said to arise generally in India but must be held to arise in the particular State where the instrument is executed. .... In all these cases the instrument can be said to be duly stamped only if it bears stamps of the amount and description in accordance with the law of the State concerned —the law including not only the Act but also the rules framed under the Act."

The learned Additional Government Pleader would thus appear to be perfectly justified in his contention that the document has to be considered as chargeable with stamp duty, when it is executed which term *executed* itself has to be interpreted in the light of the definition embodied in section 2 (12) Actually, there can be no question of impounding the document and recovering the proper stamp duty from the party liable, subsequent to registration, and this is not disputed. The real question is, did the case in *Crompton Engineering Co., Ltd* v. *Chief Controlleng Revenue Authority, Madras*[1], purport to decide that, even though a document is otherwise complete as a conveyance, or a deed of mortgage, and the recitals therein fully transfer the relevant rights in property, it is still not liable to stamp duty, either as a conveyance or as a deed of mortgage, purely because it has not been registered ?

The facts in *Crompton Engineering Co., Ltd* v. *Chief Controlling Revenue Authority, Madras*[1], have to be carefully borne in mind, in this context. We are definitely of the view that the dicta in this decision would appear to have been misinterpreted, and pressed beyond their proper scope The document itself is set forth, with reference to the effective clauses (1) and (9), in the head-note of the judgment. After extracting these clauses, Rajagopalan, J. who delivered the judgment on behalf of the Full Bench, stated as follows :

> "The document, dated 22nd March, 1948, was not attested It was not registered."

The learned Judge then extracted the definition of *mortgage-deed* embodied in section 2 (17) of the Act, that we have earlier set forth Later, he proceeded to extract section 59 of the Transfer of Property Act, which makes it essential that where a mortgage secures a principal of one hundred rupees or onwards, and it is other than a mortgage by deposit of title deeds it can be effected only by a registered instrument, signed by the mortgagor and attested by at least two witnesses The learned Judge then proceeded to make the following observations at page 569.

> "That the transfer contemplated by section 2 (17) of the Indian Stamp Act is a transfer valid in law, should be obvious Such a valid transfer could not have been effected under the document, dated 22nd March, 1948 which was neither attested nor registered Under section 59 of the Transfer of Property Act a valid mortgage can be effected only when the instrument is (i) signed by the mortgagor, (ii) attested by at least two witnesses, and (iii) registered Leaving aside the question of registration of an insufficiently stamped document, no one can claim that a document not signed by the mortgagor is an instrument of mortgage liable to be stamped..................The law embodied in section 59 of the Transfer of Property Act necessitates, the signature of the mortgagor and the attestation by at least two witnesses in equal degree. To ensure the validity of the

1. I.L.R. (1953) Mad. 566 : (1953) 1 M.L.J. 620 (F B)

instrument as a mortgage, attestation is made as much a part of the execution as the signature of the mortgagor "

Later, towards the end of the Judgment, the learned Judge observes at page 571:

> " The very difference between the definition of an instrument in section 2 (14) and a mortgage deed in section 2 (17) should show that the " transfer " provided for in section 2 (17) is a transfer valid in law To make a document liable to stamp duty as a mortgage deed, it is not enough if the document 'purports' to effect a transfer. *It must 'transfer' (Italics ours)* "

We think that it is obvious and indisputable that the last observation we have extracted will have to be read in conjunction with the earlier passage which we have also set forth, and the facts of the case. It would be an erroneous principle of interpreting the judgment, to press into service the last few observations alone, divorced from the earlier dicta and the explicit fact that the learned Judges were dealing with a document, which could not be a *mortgage-deed* at all, because it was not attested by two witnesses, as the law requires. Clearly, what the learned Judge meant was that, where the document contained recitals of disposition creating a transfer of rights, by the very force of the recitals, between the parties, and it has been completely executed, the requirements of the law being satisfied in that respect, it must be interpreted as actually transferring the rights, and hence as amounting either to a conveyance or a mortgage deed, as the case may be. But, where this execution is incomplete, even if the recitals purport to transfer rights, the document cannot come under the category of a *mortgage deed* as defined in law. The learned Judge explicitly observed.

> " Leaving aside the question of registration of an insufficiently stamped document,"

in the earlier passage We may point out that though registration is necessary under the law, to give legal effect to the document, it is not merely a power of the executant to register the document, the party to whom the interest is conveyed can also have it compulsorily registered Obviously, the category under which an instrument falls cannot be affected by the mere absence of registration, if the document is otherwise fully dispositive in character, and duly executed. The case of *Crompton Engineering Co, Ltd* v. *Chief Controlling Revenue Authority, Madras*[1], did not go beyond this, for the learned Judges of the Full Bench had before them an actual document which was not *duly executed* at all A different interpretation of this judgment would really render the provisions of the Stamp Act nugatory, envisaging as they do the charging of an instrument under the relevant article of Schedule I, depending solely on the terms of the creation of rights and due and complete execution, since the document is necessarily executed prior to its registration An interesting decision on this aspect is *Shams Din* v *The Collector, Amritsar*[2] During the course of the judgment of the Special Bench, the learned Judges observed, with reference to the definition in section 2 (12) at page 451 :

> "..........the intention of the new clause was to make it clear at what time a document became executed so as to be chargeable with stamp duty under section 3 of the Act.... .....for the purpose of the Stamp Act the clause makes all documents which are chargeable with duty when executed, chargeable as soon as they are signed by the executant "

With respect we may point out that the words *by the executant* occurring in this passage, are a distinct addition to the definition in section 2 (12) and, hence, not warranted. If *executed* means *signed*, and *execution* means *signature*, it is clear that this will include the signature of all persons, who are required by the character of the document to sign in the document, in order to give that document effect according to law. We have no doubt, therefore, that, if a document is of such a character

1. I L R (1953) Mad. 566 : (1953) 1 M.L.J. 620 (F.B.).
2. (1936) I L.R. 17 Lah. 223 (F.B.).

that both parties to the document should sign it, to constitute it a binding agreement between them, it should contain the signatures of both, similarly, if it has to be signed by two other attestors, in order to make it legal, this will also be necessarily part of the definition. But, once a document is complete in execution in this sense, and the effective words of disposition are there, immediately transferring rights by the very virtue of the document, the question of its subsequent registration is a distinct matter altogether, and the document is certainly liable to stamp duty with reference to the relevant article of the Stamp Act since execution is complete.

We have next to see whether in this particular case, the Tamil text of the alleged receipt (which has been placed before us) does or does not justify the interpretation of the document as a complete conveyance, as defined in the Stamp Act. We think it is sufficient to observe that very explicit words are to be found in the Tamil text, to the effect that for the consideration of Rs 7,000, absolute title was being conveyed in the properties to the vendee. There can be no doubt whatever, therefore, that this is not a receipt, but a conveyance, and the due and complete execution of the document is undeniable.

Learned Counsel for the respondent (Sri Gopalaswami Ayyangar) had drawn our attention to certain observations of Hawkins, J, and Lord Esher, M R, in *Commissioners of Inland Revenue* v. *Angus, The Same* v *Lewis*[1]. That was a very different case of a document which was readily an agreement to convey, which the Court of Equity would have enforced by a decree for specific performance in the event of the vendor not fulfilling his contract. Such a document, the Courts held, did not fall within the definition of *conveyance on sale* in section 70 of the Stamp Act of 1899. We are of the view that there is nothing in the dicta in this decision, which can possibly reinforce the interpretation that the document, with which we are now concerned is not by its terms, effective as an actual conveyance. As we have stressed, due execution is undisputed. As Lord Esher, M R, said if the document is not effective as a conveyance, but it requires a subsequent decree for specific performance, *it would be a contradiction of term* to say that by itself it constituted a conveyance We are quite unable to see how this decision helps the respondent.

This reference has to be accordingly answered in the form that the document is liable for stamp duty under Article 23 of Schedule I, and that the dicta in *Crompton Engineering Co, Ltd* v *Chief Controlling Revenue Authority, Madras*[2] will have to be interpreted as of restricted scope, and with reference to the facts of that case, as we have earlier pointed out.

Referred Cases Nos. 12 *and* 17 *of* 1965—These references can be very briefly disposed of. Admittedly, on the same interpretation, these documents cannot be possibly held to fall within the category or mortgage deeds under Article 40 (*b*) of Schedule I. In each of these two cases, it is indisputable that the document was not attested, as required by law, quite apart from the question of registration Therefore within the scope of the relevant definition, these were not *executed* documents at all. They do not fall within the category because they are not complete documents purporting to transfer rights of the kind contemplated. In these two cases, the references must be declined.

V.S. *References answered accordingly.*

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1. (1889) L.R 23 Q B D 579.
2. I.L.R (1953) Mad. 566 . (1953) 1 M L.J. 620 (F.B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Sivaprakasa Mudaliar .. *Petitioner* *

v.

The State of Madras, represented by the Special Deputy Collector for Land Acquisition, State Housing Board Scheme, Madras-1 and another .. *Respondents.*

Land Acquisition Act (I of 1894), sections 4 (1), 5-A and 6 (1)—Section 4 (1) notification mentioning the public purpose of " rehabilitating the slum dwellers in Madras "—Section 5-A enquiry as well as section 6 (1) notification mentioning in addition the purpose of " increasing the housing accommodation in Madras"—Validity—Thirty days' time-limit for filing objections—Object—Government's power to waive the time-limit—Discretion to reject or accept the objections filed—Delay in publication of section 6 (1) notification due to land-owner filing successive writ petitions—Notification not liable to be quashed.

The objection to the land acquisition proceedings is that the original purpose to accommodate slum dwellers had become altered and a new purpose was mentioned in section 5-A enquiry as well as in section 6 declaration. It is urged that in substance what was originally a purpose which was to rehabilitate the slum dwellers in the Madras City, had been widened to the purpose of increasing the housing accommodation in Madras City. This objection is without any force. There is nothing illegal in expanding the public purpose in the above manner in the circumstances of the case. Rehabilitating the slum dwellers means giving them proper dwelling facilities. The fact that the increasing of housing accommodation is added in the section 6 (1) declaration would only serve to make the purpose mentioned in the original section 4 (1) notification fuller and more comprehensive. It will not amount to introducing a new purpose wholly divorced from the purpose stated in the original section 4 (1) notification.

The reference to thirty days' time-limit in section 5-A is primarily intended to provide an opportunity for an aggrieved party to file objections to the proposed acquisition. Where an enquiry under section 5-A has been held and the petitioner's objections have been heard at that enquiry, there can be no more occasion for quashing the section 6 declaration, on the ground that proper opportunity had not been given to the aggrieved party to file his objections, in consequence of the expiry of more than thirty days after section 4 (1) notification The time-limit of thirty days is intended to enable the authorities in proper cases to exclude belated objections. But where, as in the present case, the authorities are prepared to excuse the delay in filing the objections and actually hear them at the section 5-A enquiry, there is no more room for objecting to the proceedings.

The authorities have a discretion in the matter of accepting the objections filed by an owner to the acquisition of any particular land and overruling the objections of the owner of another land There will be no question of discrimination in such cases for in one case the objections may be valid and in the other case the objections may not be valid. This is a matter which is within the discretion of the authorities at the time of hearing the objections at the section 5-A enquiry.

It is true that in the present case there was delay in the publication of section 6 (1) declaration after the notification under section 4 (1). But on that ground the section 6 (1) declaration could not be quashed as a considerable part of the delay was due to the successive attempts made by the petitioner to attack the land acquisition proceedings in writ proceedings.

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* W.P. No. 2872 of 1965. 20th September, 1967.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in J. 1/237/63 on the file of the first respondent and quash the notice, dated 18th April, 1964 therein issued under section 5-A of the Land Acquisition Act (I of 1894) as amended by the Land Acquisition (Amendment) Act (XXXVIII of 1923) followed by the declaration issued under section 6 of the said Act published in the *Fort St. George Gazette*, dated 26th May, 1965, Part II, section 1, page 980 in II-1 No. 2265/65 in their application to the land Government (dry) S No 154 of the extent of 2 acres 44 cents situate in Madras District, Madras Extended Area Taluk No. 111, Kodambakkam Village.

N. Arunachalam and *T. S. Rangarajan*, for Petitioner.

The Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner is the owner of land bearing S No. 154, an extent of 2.44 acres which was notified under section 4 (1) of the Land Acquisition Act in the *Fort St. George Gazette* for acquisition, and the purpose for the acquisition, which was stated in that notification, was the rehabilitation of the slum dwellers in Kanniappa-nagar and other slums in the Madras City. At that time, the enquiry under section 5-A was proposed to be dispensed with and the urgency clause in section 17 (4) was applied In W P Nos. 1094 of 1959 and 151 of 1960, this Court struck down that part of the notification which invoked section 17 (4) for dispensing with the application of section 5-A, with the result that the acquisition had to proceed from the stage of the notification under section 4 (1) It may be necessary to point out that at the time when the aforesaid writ petitions were filed, a declaration under section 6 of the Act had also been made on 26th November, 1958 The petitioner along with other persons interested in other lands in the locality filed W.P No. 80 of 1961 and some other writ petitions in this Court The contention which they urged at that time was that it was improper to proceed further with the acquisition and that in the above circumstances the notification under section 4 (1) should be quashed. One of the main grounds, which was urged before Veeraswami, J, before whom W.P. No. 80 of 1961 and other writ petitions came up for hearing was that after the notification was made, the avowed public purporse for which according to the notification, the lands were intended to be acquired had been ceased to exist or had been converted into some other purpose It was mentioned prominently that the slum dwellers for whose benefit the original notification under section 4 (1) was made, refused to leave their places and the authorities therefore proposed to allot the land for dwelling houses to people in the middle and low income groups. Veeraswami, J. refused to grant the prayer for quashing the notification under section 4 (1). The learned Judge observed that in view of the counter-affidavit filed by the Government in those writ petitions agreeing to deal with the matter from the stage of the notification under section 4 (1) the petitioners would have an opportunity under section 5-A to make to the concerned authorities all representations including the objection mentioned above to the proposed acquisition. The learned Judge dismissed the writ petitions.

That order was taken in appeal by the petitioner herein and the appeal was disposed of by a Bench of this Court consisting of the learned Chief Justice Sri Ramachandra Iyer and Venkataraman, J. on a decision which was reported in *Sivaprakasa Mudaliar* v. *State of Madras*[1] The main ground urged before the Bench was that the authorities would not be justified in making a diversion of the original purpose stated in the earlier section 4 (1) notification. The Bench was of the opinion that even if the Housing Board (the Public body at whose instance the land was proposed to be acquired) proceeded to grant the house-sites to persons belonging to the low and middle income groups in the city, it would not amount to a diversion of the original purpose In fact, the Bench went so far as to say that the original purpose of the acquisition, namely, providing house-sites for slum dwellers, if given a literal construc-

1. (1963) 2 M.L.J. 376.

tion, would include the object of providing accommodation for persons belonging to low and middle income groups as well.

Before the Bench another argument was put forward that if the original section 4 (1) notification was to be kept intact as being for a valid public purpose the subsequent proceedings would deprive the affected party of the opportunity to file objections, for the purpose of a section 5-A enquiry because section 5-A (1) states that any person interested in any land which has been notified under section 4 (1), may within thirty days after the issue of the notification, object to the acquisition of the land. It was urged that in view of the intervening proceedings leading only to a partial quashing of section 4 (1) notification, the time which the statute has thus prescribed for interested persons to file their objections had expired, and that there would, therefore, be no opportunity for aggrieved persons to file their objections, and that consequently the section 4 (1) notification also should be quashed and a fresh section 4 (1) notification should be published to give to the interested parties opportunity to file their objections within thirty days thereafter The learned Judges, who dealt with the appeal, did not go into the merits of this objection. They recorded the willingness expressed on behalf of the Government to hear the objections of the appellants before them on all the matters referred to even though the time of 30 days from the date of the section 4 (1) notification had expired In the above circumstances they were of the opinion that the petitioner herein could not have substantial grievance that an opportunity was not given to him for filing his objections within 30 days of the original notification The Bench also observed that one serious impediment to the issue of a fresh section 4 (1) notification, would be the creation of further complications in regard to the validity of the titles acquired by the various persons who had already obtained house-sites under the scheme and who had perhaps built houses thereon.

Subsequently the authorities gave an opportunity to the petitioner to file his objections, a section 5-A enquiry was held, and a declaration under section 6 also was issued on 26th May, 1965 The petitioner has thereafter filed this writ petition under Article 226 of the Constitution praying to quash the abovesaid declaration under section 6.

The main grounds urged by the petitioner in this writ petition, to a great extent, traverse the grounds already dealt with in the Bench decision above stated. It is urged in the first place that a partial striking down of section 4 (1) notification would be illegal. The reason urged in support of this contention is again the point mentioned above, and considered in the Bench decision that the aggrieved party will be deprived of an opportunity of putting forward his objections because the thirty days' time-limit prescribed in section 5-A (1) expired long previously The further objection is that the original purpose to accommodate slum dwellers had become altered and a new purpose was mentioned in section 5-A enquiry as well as in section 6 declaration. the new purpose including " the development of the area for the rehabilitation of slum dwellers in Kanniappa Nagar and other slums in Madras City ", and so far as this purpose is concerned it is the same as the one in the original notification under section 4 (1). Section 6 (1) declaration proceeds to add "that in accordance with the Land Acquisition and Development Scheme of the Government, *for the purpose of increasing house accommodation* ". It is urged that in substance what was originally a purpose which was to rehabilitate the slum dwellers in the Madras City, had been widened to the purpose of increasing the housing accommodation in Madras City. I am of the opinion that there is nothing illegal in expanding the public purpose in the above manner in the circumstances of the case. Rehabilitating the slum dwellers means giving them proper dwelling facilities The fact that the increasing of housing accommodation is added in the section 6 (1) declaration, would only serve to make the purpose mentioned in the original section 4 (1) notification fuller and more comprehensive. It will not amount to introducing a new purpose wholly divorced from the purpose stated in the original section 4(1) notification. I have already referred to the view expressed by the Bench that providing accommodation to low and

middle income groups could not amount to diversion of the original purpose in the circumstances of this case It was explained before me that the neighbourhood project in the City of Madras was intended to provide accommodation for low and middle income groups.

In this connection learned Government Pleader appearing for the respondent has cited the decision of the Allahabad High Court in *Shyam Swarup* v. *State of U.P.*[1] where a single Judge of that Court observed that though the purposes mentioned in the two notifications under sections 4 (1) and 6 were not identical, they were analogous to each other in so far as both the purposes were part and parcel of a larger public purpose, and that even if there had been an alteration of the public purpose at the stage of the notification under section 6, such alteration would not have the effect of vitiating the entire proceedings I am of the opinion that, in the circumstances of this case, there is no ground for attacking the validity of the section 6 declaration because the purpose stated therein is in no material way, different from the purpose stated in the original section 4 (1) notification

Regarding the argument that the long lapse of time subsequent to the date of the section 4 (1) notification would deprive the petitioner of an effective opportunity of putting forward his objections, the position now is that in compliance with the directions of both Veeraswami, J , as well as the appellate Bench the first respondent has given full opportunities to the petitioner to put forward his objections at the section 5-A enquiry, has overruled his objections and decided to issue a section 6 (1) declaration. The reference to thirty days' time-limit in section 5-A, is primarily intended to provide an opportunity for an aggrieved party to file his objections to the proposed acquisition Where an enquiry under section 5-A has been held and the petitioner's objections have been heard at that enquiry, there can be no more occasion for quashing the section 6 declaration, on the ground that proper opportunity had not been given to the aggrieved party to file his objections, in consequence of the expiry of more than thirty days after section 4 (1) notification. The time-limit of thirty days stated on section 4 (1) of the Act is intended to enable the authorities in proper cases to exclude belated objections. But where the authorities are prepared to excuse the delay in filing the objections, and actually hear them at the section 5-A enquiry, there is no more room for objecting to the proceedings. Further section 5-A (2) gives power to the Land Acquisitior Officer to make any such further enquiry if he thinks necessary, and that power will include the power for hearing objections which are made even subsequently to the 30 days' time-limit, provided the Officer is prepared to hear them after condoning the delay. This is what has happened in this case Learned Counsel also refers to rule 1 issued by the Government under section 55 (1) of the Act which states that the Collector shall issue notice to the persons interested to urge before the Collector within thirty days after the issue of the notification all their objections This rule is only issued in compliance with section 5-A (1) of the Act, but it does not affect the principle stated above that if the authorities are prepared to receive the objections even after the lapse of thirty days and take these objections into account at section 5-A enquiry, there can no longer be any question of the subsequent proceedings including the declaration under section 6 being vitiated.

The third point urged by learned Counsel for the petitioner is that one Krishnamurthy Iyer whose land was also included in the section 4 (1) notification had been given exemption in respect of his land, whereas the petitioner has not been given any such exemption and his lands have been taken up for acquisition. Learned Government Pleader states that Krishnamurthy Iyer's land was found to contain a tope and that was why the authorities were prepared to exclude his land from the acquisition proceedings, but the petitioner's land is not a tope It is not also claimed by the petitioner that his land is a tope. The authorities have a discretion in the matter of accepting the objections filed by an owner to the acquisition of any particular land and overruling the objections of the owner of another land. There will be no ques-

1. A I R. 1968 All 426.

tion of discrimination in such cases for in one case the objection may be valid, and in the other case the objections may not be valid. This is a matter which is within the discretion of the authorities at the time of hearing the objections at the section 5-A enquiry. This Court in *Gangadhara Mudaliar* v. *State of Madras*[1], observed that there was no question of lack of *bona fides* in this case on the part of the authorities, nor was there any question of any deliberatae discrimination favourable to others and unfavourable to the appellant on grounds which were irrelevant or improper. A Bench of this Court in *Sivaprakasa Mudaliar* v. *State of Madras*[2], has referred to the Board's Standing Order 90, rule 9 as laying down the kind of objections available to an owner of the land whose land is proposed to be acquired, namely:—

> "(1) that the purpose for which the land is acquired is not a *bona fide* public purpose;
>
> (2) that the petitioner's land notified is not the best adopted to the purpose intended or that its area is greater than what is actually applied for the purpose; and
>
> (3) the acquisition of the land or any land in the locality is not desirable or expedient."

There is no question in this case of the authorities giving up the land of Krishnamurthi Iyer, and deciding to acquire the land of the petitioner, actuated by *mala fide* motives. For the reason mentioned above, the authorities were entitled to drop out one piece of land out of the items notified under section 4 (1), and proceed with the acquisition of the other pieces of land. It is urged that subsequently Krishnamurthy Iyer has allotted his land for a housing colony and the petitioner would also like to do likewise if his lands were also exempted. But that will not be a relevant consideration for this Court, while dealing with the matter in writ proceedings.

Finally it is urged by learned Counsel for the petitioner that the section 4 (1) notification was issued in this case on 17th September, 1958 and that though nine years had passed since that time, the award enquiry has not yet been passed, and the compensation, which the petitioner would get in such circumstances, would be based on the market value of land prevailing in 1958 and would not take into account the rise in prices in the interval and that this will work great hardship to the petitioner. He referred to the decision of the Supreme Court in *State of Madhya Pradesh v. Vishnu Prasad*[3]. The Supreme Court observed on that decision that by reason of long delay after the notification under section 4 (1) notification, prices had risen in the meantime, and therefore the person whose land was sought to be acquired would stand to lose But the important point to be observed is the context in which the above observations were made. In that case successive section 6 declarations were issued or the basis of a single original section 4 (1) notification. The Supreme Court condemned the practice, of using a single section 4 (1) notification as a kind of reservoir from which the Government might from time to time pick out different parcels of land and make successive section 6 declarations, as a measure calculated to cause great prejudice to the owners of the land. In the present case, while the delay undoubtedly is there, it must be stated that a considerable part of the delay is due to the successive attempts made by the petitioner to attack the land acquisition proceedings in writ proceedings. The attack commenced with a writ petition filed in 1961 and the present writ petition is in fact the third in the series, if we include the Bench appeal which has been referred to above.

In the circumstances, I see no grounds to interfere with the section 6 declaration. The writ petition is dismissed. There will be no order as to costs.

V.K. —— *Petition dismissed.*

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1. I.L.R. (1965) 1 Mad 374 at 377.
2. (1963) 2 M.L.J 376 at 380
3. (1966) 2 S.C.J 231 : A.I.R. 1966 S.C. 1593.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The Government of Madras, represented by the Superintending Engineer, Public Health, Madras .. *Appellant**

v.

The Superintending Engineer (Special Buildings Circle), P.W.D., Madras, and another .. *Respondents.*

Arbitration Act (X of 1940), section 30—Award—Setting aside—Arbitrator—Legal misconduct—Contract—Company and Government—Price variation clause—Extension of time for completion of contract given by Government—Price variation clause during the extended period—Arbitration—Award taking note of prior opinion of Officer of Government in interpreting the contract—Legal misconduct—Award liable to be set aside.

As the contract was not completed within the time originally specified, the company prayed for an extension of time The Superintending Engineer, the other party to the contract, informed the company that he had written to the Government for sanctioning the extension and adding that in any event the company would not be entitled to the benefit of the price variation clause during the extended period. The Government sanctioned the extension without any further conditions relating to the price variation clause. The company invoked the price increase clause during the extended period and sought to recover the amount and this was the subject-matter of the arbitration. The Arbitrator rejected the claim of the company, holding that the Government order must be construed as subject to the previous correspondence and since it was the Superintending Engineer who under the contract, was entitled to extend the time, the Government order must be read as though the extension was subject to the condition that the price variation clause could not be invoked by the company. The Single Judge of the High Court set aside the award. The Government appealed.

Held, the award is liable to be set aside under section 30 of the Act on the ground of legal misconduct on the part of the arbitrator.

It is not every error of law which necessarily vitiates an award. If a specific question of law is the sole content of the reference to arbitration, even an erroneous finding on that question of law, may not vitiate the award. Further, errors which are ancillary to, and part of, the narrative of the facts embodied in the award, may not vitiate the award But a legal proposition which is the basis of the award, does make the award itself erroneous.

If the arbitrator took into account the facts of negotiations which were extraneous in interpreting the contract or the surrounding circumstances for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree, it would amount to legal misconduct.

On the facts, the true contracting parties are the Government and the company, and the only proper interpretation of the Government order is that, fully cognisant of the prior facts and correspondence, the Government chose to extend the time in an unqualified manner, thereby implying that the benefit of the price variation clause was available to the company, during the extended period also. In interpreting the Government order the prior correspondence should not have been referred to at all, and the views of the Superintending Engineer are totally irrelevant. In other words, the arbitrator has interpreted the vital document,

* O.S.A. Nos. 114 and 115 of 1966. 3rd October, 1967.

in the light of some opinion of the Officer earlier expressed, which is wholly irrelevant and inadmissible, as far as the task of interpretation is concerned.

Case law discussed.

On appeal from the Judgment of Sadasivam, J., (under clause 15, Letters Patent), passed in O P. No. 182 of 1965.

The Government Pleader and *C. Rangaswamy Ayyangar*, for Appellant.

K.C. Jacob, S. K. L Rattan and *R. Vedantam*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, C.J—With reference to a contract between Messrs Indian Hume Pipe Co , Ltd. and the Government of Madras, represented by the Superintending Engineer (Public Health), Madras, there was an arbitration upon certain matters as provided for in the contract itself. The arbitrator was the Superintending Engineer (Special Buildings Circle), P.W D. and the relevant findings in the award are (1) that the extra amount claimed by the company to the tune of Rs. 57,637-16 due to price variations, should be negatived and (2) that no interest can be claimed by the company after 26th December, 1963. With regard to these findings of the award there were two petitions before Sadasivam, J , O P No. 182 of 1965, a petition by the Superintending Engineer for recording the award by its reception into Court, O P. No. 241 of 1965 by Messrs. Indian Hume Pipe Co., Ltd , under section 30 of the Arbitration Act, to set aside the award The learned Judge allowed the application by the company and dismissed the application by the arbitrator and the relevant appeals are from his decision in the matters.

There are two grounds which arise for our determination within the compass of these appeals. The first is whether the award of the arbitrator is vitiated by error of law apparent on the face of the record, both with regard to the negation of the benefit of the price variation clause and with regard to interest. In a sense, this may be said to be the part of the appeals that concerns the merits. The second question follows inevitably from the findings on the first, even if these findings are in favour of the company. That question is whether, even assuming that the award is totally erroneous and unsustainable, it can be set aside within the scope of section 30 as amounting to 'legal misconduct' on the part of the arbitrator. That question depends on the principles of law to be applied in the reversal or modification by the Court, of such an award by a domestic tribunal We find from the judgment of the learned Judge (Sadasivam, J.) that though he has proceeded fully into the merits, he has not discussed the relevant aspect of the second question, which is equally vital Certain authorities have also been referred to before us on this second aspect. We shall first set forth the essential facts, and deal with the merits of the argument that the award is *prima facie* quite unsustainable, and then proceed to the question of law which is involved.

The documents which will be sufficient for determination of the main issue of fact are the contract itself, certain particulars to be gathered in the claim statement, certain passages in the correspondence between the parties, and G O. Ms. No. 3436 (Health), dated 26th November, 1967 We may add that many of the facts of the records are not in dispute. Thus, for instance, it is not in dispute that the contract itself provided for a price variation clause. This states that prices were based on current controlled rates for steel and cement and if there was any rise in the price of materials, the Government were bound to pay for the increase subject to the production of certificates from the respective controllers. There is another clause by which the company was entitled to apply for extension of time for completion of the contract, on certain particularised grounds. This clause clearly states that the Superintending Engineer (Public Health) with whom the contract was executed

formally, was entitled, if he was satisfied about the cause for the delay, to grant this extension of time.

What actually happened between the parties was that the contract was not completed within the time originally specified, and the company prayed for extension of time, invoking several of the contingencies which are referred to in the contract as amounting to justification for the grant of extension of such time. The Superintending Engineer (Public Health), who, under the contract, was entitled to extend the time for completion of the contract, addressed a letter to the company, dated 26th September, 1957, which is of some importance. In the first paragraph he states that he has addressed the higher authorities, namely, the authorities of the Government for according sanction for extension of time upto 31st March, 1958, for the two contracts in question. In other words, he unambiguously declares that he himself was not competent to grant this extension of time, but that it had to be formally sanctioned by the Government. In the succeeding paragraph, he informs the company that, assuming that the extension is granted, the company will not be entitled to the benefit of the price variation clause during the extended period. That is his view or decision, whichever it might be termed and the language is quite categorical that this officer was of the view that the extension should be granted, only subject to the condition that the company could not invoke the price variation clause, if there was an increase in price

However that might be, the Government finally sanctioned the extension of time by G.O. Ms No 3436, dated 26th November, 1957. This is a very brief order in clear terms, amounting to an extension of time for completion of the contract, without any conditions whatever attached to the grant. There is no reference at all to the price variation clause, and it is not stated that the company cannot invoke the benefit of this clause, in case it should establish an increase in prices, during this period, of the controlled commodities

Such increases did occur, and the company invoked the price increase clause during the extended period, and sought to recover the amount already referred to by us. This was the subject of the arbitration and the award The arbitrator held, for reasons that we need not go into at the moment, that the Government order must be construed as subject to the previous correspondence, and that, since it was the Superintending Engineer (Public Health) who, under the contract, was entitled to extend the time, the Government order must be read as though the extension was subject to the condition that the price variation clause could not be invoked by the company. The learned Judge (Sadasivam, J.) pointed out that, on several grounds, this view was totally erroneous and unsustainable

On this point, we are in entire agreement with the learned Judge, and indeed, it is difficult to see how any other view is possible. First of all, the contract, though formally between the company and the Superintending Engineer (Public Health) could not actually be construed as such, for a very simple reason. The last paragraph of the contract describes the contracting parties, and the Superintending Engineer claims that he enters into the contract "for and on behalf of and by the order and direction of His Excellency the Governor of Madras". Thus it is very clear that the Superintending Engineer (Public Health) is a nominee of the Government, who enters into the contract as authorised by the Government and under the directions of the Government. Indeed, it was for that very reason that the Superintending Engineer later affirmed that he could not grant extension of time prayed for, and that he could only address the Government for sanction Secondly, it is equally clear that the Government Order granting extension of time is unconditional in its terms Here, the arbitrator read the record in a perspective, precisely opposite to the perspective which should have been adopted The Government, in promulgating the Government Order, were perfectly aware of the prior correspondence, and what the Superintending Engineer had told the company. Nevertheless, they chose to extend the time, without any contingency of qualification whatever being attached thereto. This necessarily implies that they did not think it

right or expedient, that the company should be deprived of the benefit of the price variation clause, during the extended period of the contract. It must be borne in mind that the Government were the sole judges in this matter, that the Superintending Engineer could only place the merits before them, and that it is the decision of the Government alone that really determined the respective rights of parties.

Therefore, we have no doubt whatever that the award is vitiated by errors apparent on the face of the record, and if such an award by the arbitrator could be held as amounting to 'legal misconduct', section 30 could have been rightly invoked by the company in its application.

The authorities on this aspect are very clear, and we think it is sufficient to refer to the following among them: *Chamsey Bhara Co* v *Jivraj Belloo Co*,[1] *Union of India* v. *Ballie Ram*[2], *J. U. Sheth* v *Chintamanrao Balaji*[3] and *Vellore Electric Supply Corporation* v. *State*[4]. As the Judicial Committee observed in *Champsey Bhara Co* v. *Jivraj Belloo Co.*[1] it is not every error of law, which necessarily vitiates an award. If a specific question of law is the sole content of the reference to arbitration, even an erroneous finding on that question of law, may not vitiate the award. Further, errors which are ancillary to, and part of, the narrative of the facts embodied in the award, may not vitiate the award. But a legal proposition which is the basis of the award, does make the award itself erroneous The Supreme Court pointed out in *Union of India* v. *Ballie Ram*[2] that the award of an arbitrator is ordinarily final and conclusive. It is the decision of a domestic tribunal chosen by the parties, and Courts should not exercise appellate powers over the decision, whether it is erroneous or otherwise. An award which is bad on the ground of an error of law on the face of the award, is sufficient to vitiate the award. But this subject to the qualification that where the reference itself is on a question of law, an erroneous conclusion on that question may not vitiate the award, or amount to "legal misconduct" *J U. Sheth* v. *Chintamanrao Balaji*[3] reiterates these principles and affirms that the Court cannot go into the fallacious nature or otherwise of the reasoning that sustains the award, and it is not open to the Court to attempt to probe into the mental process by which the arbitrator has reached his conclusion, where this is not disclosed by the terms of the award.

The Bench decision of this Court in *Vellore Electric Supply Corporation* v. *State*[4], is interesting for the reason that it related to an award said to be purely upon a question of law, which was attacked because of the error of law embodied in the award. Ganapatia Pillai, J., delivering the judgment of the Court, referred to the dicta of Viscount Cave, L C. in *Kalanten Government* v. *Duff Development Co.*[5]. In that passage the question of the intrusion of extraneous matter in the award is dealt with and it is observed that if the arbitrator took into account the facts of negotiations which were extraneous in interpreting the contract "he was in error" Further "the surrounding circumstances may not be used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree."

We consider that these passages are very pertinent to the present context. Whatever might have been the prior correspondence and whatever might have been the views of the Superintending Engineer (Public Health) about the degree to which the company could or could not invoke the benefit of the price variation clause, the fact remains that there are only two effective documents in the entire record. The first is the contract, which includes the power of the Government to extend the time and the second is the Government Order actually extending the time. The learned Government Pleader does not argue, that, under the contract, the Government were bound to suspend the price variation clause during the extended time, or they had no power to furnish the benefit of the clause, even for the extended period of the contract. Obviously, they had the power and discretion to do so. In interpreting the Government Order, the prior correspondence should not have been referred to at

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1. 44 M.L.J. 706 : L R 50 I.A. 324 : A.I.R. 1923 P C. 66.
2. A I.R. 1963 S C. 1685.
3. A.I.R. 1965 S.C. 214.
4. I.L R. (1959) Mad. 697 : (1959) 1 M.L.J. 318.
5. L.R. (1923) A.C. 395.

all, and the views of the Superintending Engineer are totally irrelevant. As we have pointed out, the true contracting parties are the Government and the company, and the only proper interpretation of the Government Order is that, fully cognisant of the prior facts and correspondence, the Government chose to extend the time in an unqualified manner, thereby implying that the benefit of the price variation clause was available to the company, during the extended period also. In other words, the arbitrator has interpreted the vital document, in the light of some opinion of the officer earlier expressed, which is wholly irrelevant and inadmissible, as far as that task of interpretation is concerned.

As we have observed earlier, the learned Judge (Sadasivam, J) has not discussed this aspect of "legal miscondut". A case which is very close to the context is *Welford Baker & Co.* v. *Meefie & Sons*[1] the facts of which will be found set forth in Russell on Arbitration, 17th Edn., page 180 There was a contract for sale of sugar in that case, and there was no provision for suspension of deliveries owing to causes beyond the control of the sellers. In a dispute which led to arbitration, a former contract between the parties containing such a suspension clause, was relied on by the arbitrator in interpreting the contract. This was held to amount to "legal misconduct" inasmuch as the arbitrator had looked to another document which was inadmissible for the purpose, and which further went to the root of the question submitted to him for decision In the present case, the precise parallel is the use of the letter of the Superintending Engineer to the Government, by the arbitrator, in order to modify the Government order, in a form that was not warranted by its terms

We have no hesitation whatever, therefore, in dismissing the appeal by the State on this ground Regarding the ground relating to interest, the learned Judge has himself pointed out that the company had made the demand for interest at six per cent per annum in its letter, dated 25th December, 1963, and that the company would be indisputably entitled to such interest under the law, and under the Interest Act. This ground of appeal has also therefore to fail As the company has now filed a suit on the contract (O S. No. 179 of 1966), we desire to make it explicit, that our conclusions will not prejudice that suit in any manner.

In the result, both the appeals by the Government are dismissed with cost—One set.

V S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M NATESAN

V. Mohamed Haneef & Co., Ranipet, North Arcot Dt .. *Petitioners**

v.

The Regional Director, Employees State Insurance Corporation, Madras-4. .. *Respondent.*

Employees' State Insurance Act (*XXXIV of* 1948), *section* 2 (12)—*Definition of 'factory' under—Requirements—Tanning process carried on with manual labour in tannery—However, water required for tanning lifted with the aid of power from a well situated outside tannery premises—If makes the manufacturing process carried on in tannery one carried on with the aid of power—If such a tannery falls within the scope of section* 2 (12).

Factories Act (*LXIII of* 1948), *section* 2 (k)—*Scope.*

For an establishment to be a 'factory' under section 2 (12) of the Employees' State Insurance Act, 1948, the following conditions must be satisfied : (1) there

1. 84 L.J K B. 2221.

* W P. Nos 1166 of 1962, 2652 of 1966 and L P A. No 43 of 1964. 3rd November, 1967.

must be a premises which also includes its precincts ; (2) 20 or more persons must be employed in the premises for wages or must have been employed on any day of the preceding 12 months ; (3) manufacturing process must be carried on in any part of the premises and (4) the manufacturing process must be carried on with the aid of power or is ordinarily so carried on If the aforesaid conditions are satisfied the entire premises including the precincts thereof would be a ' factory' even though the actual manufacturing process is carried on in a part of the premises

' Precincts ' is a relative word and is really an adjunct of a premises The term ' premises ' indicates the main building and its appurtenances. Lest any part of vacant lands attached to the establishment should be omitted in the definition precincts are included or added to the premises. The use of mechanical process, whether within the premises proper or on the precincts, would make the place a factory if other conditions are satisfied.

It is a requirement that a place forming precincts must be a definite place with boundaries and it is essential that the place must be an adjunct of the principal premises. But merely enclosing a part of the premises of an establishment where 20 persons are employed with boundary walls and locating the place where power for the manufacturing process of the establishment is utilised just outside or adjoining land, may not be sufficient to take the establishment out of the definition of ' factory ' if all the other conditions are satisfied

There is no dispute in the present case that the tanning establishments under consideration carry on the manufacturing process of tanning This manufacturing process is manifestly carried on by manual labour within the premises of the establishments and not outside. The question is whether it can be said that the manufacturing process is carried on with the aid of power merely because the water required at the several stages of tanning is pumped out with the aid of power from a well outside the tannery premises or precincts and brought through channels or conduit pipes into the tannery, the water flowing in a natural way by force of gravity The answer must be in the negative It is not urged that the tanning process requires flow of water at any particular velocity or quantity for more effective and convenient user of water in the tanning The mere fact therefore that water has been lifted at some point by mechanical process using power, will not itself make the manufacturing process carried on in the tanneries a process carried on with the aid of power.

Case law discussed.

The question whether the manufacturing process is being carried on with the aid of power is ultimately one of inference from facts. The disassociation of the well and pumping from the factory premises will be an element which has to be taken into consideration. The mere fact that the water utilised has been pumped by electricity will not connect the pumping with the manufacturing process There must be certain inter-linking in the functioing of the pump with the manufacturing process carried on in the factory.

It may happen that in a particular establishment the pumping of water and utilisation of it in the manufacturing process is so integrally connected with the manufacturing process that the pumping cannot be disassociated from it May be that the actual process of tanning is carried on with manual labour All the same the pumping of water may in a given case be so intimately linked up with the manufacturing process in its location, object and operation to secure flow of water with force and impact for the cleansing of skins with a view to more efficient and economical working of the tannery, that it would be difficult to disassociate the pumping process from the actual tanning process. But such is not the case in the present tanneries.

It could not be said that the very pumping and storage of water itself would amount to a manufacturing process It is true that that section 2 (*k*) of the Factories Act while defining ' manufacturing process ' includes in the proces

pumping oil, water or sewage. But pumping oil, water or sewage in the context of the several sub-clauses of section 2 (*k*) can refer to the operation of pumping itself as a substantial activity It is not intended to cover pumping which is merely ancillary to some other manufacturing process, as in the present cases

Observations to contrary in *M H Ismail Sahib & Co* v *Regional Director, E.S.I. Corporation*, (1961) 1 M L J 16 and *Moosa Kazimi* v *K. M Sheriff*, (1959) 2 L.L.J. 344 : A.I R. 1959 Mad. 542, disapproved : *M S Abdulla Basha & Co.* v *Regional Director, E S.I. Corporation*, I L R (1965) 1 Mad. 293, followed

It follows that the tanneries in the present case as worked do not fall within the scope of the definition of 'factory' in section 2 (12) of the Employees' State Insurance Act and therefore the provisions of that Act cannot be applied to them.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to forbear from enforcing the provisions of the Employees' State Insurance Act of 1948 in pursuance of proceedings No. MR/CN-51-3944-21, dated 10th September, 1962, on his file against the petitioners in respect of their tannery, etc

V. K Thiruvenkatachari, for *T. T. Srinivasan* and *A N Rangaswamy*, for Petitioner in W.P No 1166 of 1962 for *M/s. King & Partridge*, for Petitioner in W. P. No. 2652 of 1966 and for Respondent in L P.A No 43 of 1964

The Government Pleader for Respondent in W P. No 1166 of 1962, for 2nd Respondent in W P No 2652 of 1966, and for Appellant in L P.A No 43 of 1964.

The Judgment of the Court was delivered by

Natesan, J.—In these cases we are concerned with the true scope of the definition of 'factory' in section 2 (12) of the Employees' State Insurance Act (Central Act XXXIV of 1948) and whether the tanneries in question in these cases would come under that definition of 'factory' For the tanneries it is contended that they do not, while the Regional Director, Employees' State Insurance Corporation, contends that they do fall under the definition of 'factory' in the Act A brief reference to the circumstance under which the question arises for determination is necessary at this stage for a proper appreciation of the problem.

The petitioner in W P. No 1166 of 1962 owns a tannery at Ranipet in North Arcot District, wherein the several processes of tanning of hides and skins are carried on by manual labour The premises where the tanning is carried on are enclosed with walls and within the premises the raw and dried skins and hides undergo various processes, such as soaking, liming, unhairing, flashing, deliming, scudding, colouring, buffing, etc. The water which is essential at the several stages of the tanning processes is obtained from a well in an open space outside the compound. Water from the said well is pumped into a tub near the well with the help of one horse-power motor pump set worked by electric energy From the aforesaid tub the water is led by a channel on the ground into the premises for washing, cleaning and other tannery processes done by hand The water flows through the channel into the tannery premises by gravity More than twenty people are employed in the process of tanning within the premises but have no access to the pump set which is in charge of an independent care-taker. Electric power is not used within the premises at any stage for the tanning processes The dispute between the petitioner and the Regional Director, Employees' State Insurance Corporation, the respondent in the petition, arises on the demand of the respondent for contribution from the petitioner under the Employees' State Insurance Act Section 38 of the Act enjoins that all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act. The contribution under the Act in respect of an employee shall comprise contribution payable by the employer referred to as the employer's contribution and the one payable by an employee referred to as the employee's contribution. Under section 73-D the employer's special contribution payable under Chapter V-A may be recovered as if it were an arrear of land

revenue and section 85 provides for penalties for failure to submit returns, to pay contributions etc., in terms of the several provisions of the Act The petitioner contends that for the establishment to come within the definition of 'factory' under the Act, the basic requirement of the definition, namely, that the manufacturing process must be carried on with the aid of power, should be satisfied, and that it is not so in the present case. Therefore the petitioner denies its liability to submit returns and pay contribution under the Act. There is no serious dispute as to the facts by the Regional Director. It is only said that the well with the pump set is situated just about five feet north-west from the western wall of the tannery premises and the eastern embankment of the well is connected with the western wall of the tannery premises. It is also said that the petitioner pays rent for the tannery building and also for the open space where the well is situated. The Regional Director would contend that the requirements of 'factory' within the meaning of section 2 (12) of the Act are satisfied in this case. The petitioner, on threat of proceedings by the Regional Director for non-compliance with the requirements under the Act and default of payment of contribution, has come to this Court praying for the issue of a writ of *mandamus* against the respondent directing him to forbear from enforcing the provisions of the Act.

The Letters Patent Appeal No 43 of 1964 and W P. No. 2652 of 1966 relate to another tannery located at Vaniyambadi in North Arcot District. The East Asiatic Company (India) Private Ltd., owning the tannery applied in the Court of Additional Commissioner for Workmen's Compensation for a declaration that it was not liable to the Employees' State Insurance Corporation for the employer's special contribution prescribed in section 73-*B* of the Act in respect of its tannery. Here also power is not used within the factory premises for any manufacturing purpose. But power is used only for pumping out water from a well outside the tannery premises. There is a well inside the tannery premises with an oil engine for pumping water therefrom. But the water from this well is not used in the manufacturing process due to some technical reasons. Water from the well outside the premises alone is brought through conduit pipes for the manufacturing process. The well in question from which water is drawn for manufacturing process is situated in a cocoanut tope, a furlong away from the tannery premises, and in the open space between the well and the tannery premises there is another tannery owned by a third person. This well, it is said, is common to several persons and with the aid of power water is pumped from the well to a raised tub and stored there From this tub the water flows through pipe lines laid under the premises of the tannery belonging to a third party. On reaching the petitioner's tannery premises the water is filled in pits for the several tanning processes. Power is used only at the stage of lifting the water from the well to the tub and thereafter there is free flow of water to the tannery premises by the force of gravity. Within the premises the tanning processes are carried on with the manual labour and no power is used. The Additional Commissioner for the Workmen's Compensation decided that the act of pumping water is also manufacturing process and as admittedly there is a well inside from which water is pumped by an oil engine, all the essentials of definition of 'factory' under the Act are satisfied. Against this order of the Additional Commissioner for Workmen's Compensation, the owners of the tannery preferred an appeal to this Court as provided for under section 82 (2) of the Act. On this appeal, Venkatadri, J , upheld the contention of the owners of the tannery that they were not carrying on manufacturing process with the aid of power in any part of the premises and that therefore the order of the Additional Commissioner for Workmen's Compensation was not correct. Before the learned Judge the very maintainability of the appeal was questioned. But the learned Judge overruled the objection The Letters Patent Appeal has been preferred by the Regional Director against the decision of Venkatadri, J Inasmuch as the maintainability of the appeal has been questioned and the owners of the tannery premise are not sure of the same, they have *ex abundanti cautela* preferred W P No. 2652 o 1966 under Article 226 of the Constitution for the issue of a writ of *certiorari* or any other appropriate writ quashing the impugned order As differing views have been expressed by learned single Judge of this Court in the application of the Act to tan

aeries utilising water similarly obtained, W.P No 1168 of 1962 which in the first instance came up for hearing before Srinivasan, J, was referred by the learned Judge for hearing by a Division Bench. It is thus all the matters are now before us.

The essential requisite for the establishments in question we are using a neutral expression—to be liable for contribution is that they must fall within the definition of 'factory' in the Employees' State Insurance Act, 1948 The Act which is intended to provide for certain benefits to employees in case of sickness, maternity and employment injury and related matters, by section 1 (4), enacts that it shall apply in the first instance to all factories including factories belonging to the Government other than seasonal factories Under setion 2 (12) 'factory' is defined thus .

> " 'factory' means any premises including the precincts thereof whereon twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act, 1952 or a railway running shed . "
>
> The expressions 'manufacturing process' and 'power' shall have the meanings respectivly assigned to them in the Factories Act, 1948 "

The Factories Act to which we have to refer for the definition of the expressions " manufacturing process " and "power" defines 'factory' under section 2 (*m*) thus:

> " 'factory' means any premises including the precincts thereof —
>
> (*i*) whereon ten or more workers are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 " (relevant part only extracted).

The material difference in the language is, whereas in the Factories Act ten or more persons should be working in the premises, in the Act now under consideration the requirement is 20 or more persons and secondly whereas the Factories Act speaks of "ten or more workers working or were working" the Act under consideration speaks of persons " employed or were employed for wages" We may here point out that even under the Employees' State Insurance Act, 1948 previously the language employed was 'persons are working or were working' and it is by Act XLIV of 1966 the words 'are employed or were employed for wages' were substituted The amendment gets a wider coverage of persons entitled to be benefited by the Employees' State Insurance Act As will be apparent by a reference to a definition of 'worker' and 'employee' in the respective Acts, whereas the object of the Factories Act is to secure health, safety and welfare, proper working hours and other facilities for workers employed and working in factories, the object of the State Employees' Insurance Act is to secure maternity, disablement and medical benefits to employees in factories and establishments and also benefits to their dependents The Factories Act does not extend its benefits to those working outside factory premises and precincts, whereas the State Employees' Insurance Act by the definition of 'employee' extends its benefits to persons working in the establishments and those working outside, that is field workers Under the Factories Acts the requirement is ten or more persons are or were working in the establishment whereas under the State Employees Insurance Act the requirement is "twenty or more persons are or were working " in the establishment. Under both the Acts the manufacturing process must be carried on with the aid of power

'Manufacturing process' is defined under section 2 (*k*) of the Factories Act thus:

> " 'Manufacturing process' means any process for
>
> (*i*) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water or sewage .... "

(Relevant part only set out)

'Power' is defined in the said Act thus:

" 'Power' means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency "

Now, we shall proceed to examine the requirements for 'factory' under the Employees' State Insurance Act, 1948, in the light of the above definitions. For an establishment to be a 'factory' the following conditions must be satisfied : (1) there must be a premises which also includes its precincts , (2) 20 or more persons must be employed in the premises for wages or must have been employed on any day of the preceding 12 months , (3) manufacturing process must be carried on in any part of the premises and (4) the manufacturing process must be carried on with the aid of power or is ordinarily so carried on. If the aforesaid conditions are satisfied then the entire premises including the precincts thereof would be a 'factory' under the Act, even though the actual manufacturing process is carried on in a part of the premises. Neither the expression 'premises' nor the term 'precincts' is defined in the Act. Stroud's Judicial Dictionary interprets 'premises' as some definite place within metes and bounds, for example, land or land with buildings upon it. The term 'precincts' is defined in Shorter Oxford Dictionary thus :

" The space enclosed by the walls or other boundaries of a particular place or building or by an imaginary line drawn around. "

'Precincts' is a relative word and is really an adjunct of a premises The word 'precincts' comes from the latin *praecingere* meaning 'to surround or gird'. Webster's 20th Century Dictionary, for the expression 'precincts' in plural gives the meaning environs. It is defined further as an enclosure between buildings, walls etc , specifically the grounds immediately surrounding a religious house or church The term 'premises' indicates the main building and its appurtenances Lest any part of vacant lands attached to the establishment should be omitted in the definition precincts are included or added to the premises The use of mechnical process, whether within the premises proper or on the precincts, would make the place a factory, if other conditions are satisfied In *Halsbury's Laws* of England, 3rd Edition, Vol 17 at page 15, 'factory' is described thus .

"A factory must occupy a fixed site but a place is not excluded from the definition of factory only by reason of the fact that it is in the open air Subject to the exceptions mentioned hereafter, the area of the factory in the whole space contained within its walls "

As will be seen from the definitions it is a requirement that a place forming precincts must be a definite place with boundaries, and it is essential that the place must be an adjunct of the principal premises But merely enclosing a part of the premises of an establishment where 20 persons are employed with boundary walls and locating the place where power for the manufacturing process of the establishment is utilised just outside or adjoining land, may not be sufficient to take the establishment out of the definition of 'factory', if all the other conditions are satisfied In *Nagpur Electric Light and Power Co* v. *E S I.C* [1], the Supreme Court had to consider the question whether certain employees of the Nagpur Electric Light and Power Company were employees within the meaning of section 2 (*g*) of the Employees State Insurance Act. After referring to the requirements for a premises to constitute a factory under the Act, Bachawat, J., delivering the judgment of the Court observed :

" The premises constituting a factory may be a building or open land or both See *Ardeshir N Bhiwandiwala* v *State of Bombay*[2] Inside the same compound wall, there may be two or more premises; the premises used in connection with manufacturing processes may constitute a factory, and the other premises within the same compound wall may be used for purposes unconnected with any manufacturing process and may form no part of the factory. "

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1 (1968) 1 S.C.J. 374: (1967) 2 L.L.J. 40 at 43. 2. (1961) 2 L.L.J. 77. (1961) 3 S.C.R. 542.

Dealing with the reasoning of the High Court that the whole area over which the process of transmission was carried on including the sub-stations where electricity was stored and supplied to the consumers by further transmission lines would all be a factory, it was said.

"We cannot accept this line of reasoning. It seems to us a startling proposition that every inch of the wide area over which the transmission lines are spread is a factory within the meaning of section 2 (12). 'A factory must occupy a fixed site'. *See* Halsbury's Law of England, 3rd Edition, Volume 17, Article 15, p. 15. The company's factory has a fixed site. It is located inside the Kamptee Road premises and its boundaries are fixed by the compound wall of the premises."

In *Regional Director, E.S.I. Corporation* v. *Sriramulu Naidu*[1], the Division Bench observed:

"In our opinion the scope of the statutory definition of the term 'factory' and the application of the Act (the Employees' State Insurance Act, 1948) cannot be decided on the basis of what the employer, either for the sake of efficiency or convenience of management, does, *e.g.*, by dividing the factory into various departments. The essential requisites of a factory under the Act are (1) a premises, geographical area within a certain boundary, (2) in a part of which at least manufacturing process should be carried on with the aid of power and (3) twenty or more persons should be working in the premises. It is not necessary that all the twenty persons should be working in the same section or department."

There is no dispute that the tanning establishments under consideration carry on manufacturing process. Raw and dried skins and hides undergo various processes with a view to their adaptation for profitable use, sale and disposal. This manufacturing process is manifestly carried on by manual labour within the premises of the establishments and not outside.

Really the substantial question for consideration in these cases is whether it could be said that the manufacturing process is being carried on with the aid of power for the reason that the water utilised in the process is lifted by power from a well before it is taken through channels or pipes to the tannery premises. This involves an interpretation of the clause 'manufacturing process is being carried on with the aid of power'. The manufacturing process that has been carried on in the establishments is tanning. The question is whether it can be said that the tanning is done with the aid of power. In these cases power comes into the picture only in that the water is lifted from a well situated outside the establishments by electric power and stored in tubs and therefrom the water is diverted into the establishments the water flowing into the establishments in a normal way the ground levels facilitating the flow. The words 'carried on with the aid of power' do not appear to us to have been used as terms of art and they are not technical expressions. The words should be construed in the sense which people conversant with the subject-matter with which the statute deals would attribute to them. The words 'with the aid of power' look to us plain English words meaning that power is employed in the manufacturing process that is it also assists the manufacturing process. The vital question for consideration is whether power in aid of manufacturing process is used in any part of the premises or precincts. If power is used outside the premises and not even on the precincts can it be said that the manufacturing process which is carried on in the premises is done with the aid of power merely for the the reason the water used has been lifted from the well with the aid of power?

For ascertaining the force of the expression 'with the aid of power' we may usefully refer to the decision in *Law* v. *Graham*[2], in which the application of words 'steam, water or other mechnical power is used in aid of the manufacturing process' came up for consideration. Under the English Factory Act, 1878, a premises would be factory wherein any manual labour was exercised by way of trade or for purposes of gain in or incidental to adopting for sale of any article and wherein or within precincts of which, steam, water or other mechnical power was used in aid of the manufacturing

1. (1960) 1 M.L.J. 257 at 262. 2. L.R. (1901) 2 K.B. 327 at 330.

process carried on there. In the premises beer was bottled for sale; but the filling was done by manual labour. The bottles however before being filled up were washed by a rotary brush driven by a small gas engine held in position by hand. Lord Alverstone, C J, while of the view that by a somewhat strained construction it is possible to regard the process of bottling the beer brought in casks wholesale as adapting of the article for sale, held that the washing of the bottles by mechanical means could not be fairly called a process which was used "in aid of" the bottling of the beer. He observed:

"It is true that the bottles must be clean, and that the respondents wash them because they are going to put beer into them; but, in my opinion, that operation is not "in aid of" in the sense in which those words are used in the section."

Another decision which is relevant in the context is that of Rajagopalan, J, in *New Taj Mahal Cafe Ltd* v *Inspector of Factories*[1] The question in that case was whether the use of a refrigerator run by electric power for storage purposes, in a restaurant where the preparation of foodstuffs and other etables was done in a kitchen forming part of the restaurant would fall within the definition of manufacturing process so as to bring the restaurant under the definition of 'factory' in section 2 (*m*) of the Factories Act for the reason that power could be considered to be used in aid of manufacturing process. The learned Judge observed

"........every place where a Frigidaire is used will not become a factory, even if the requisite number of persons are engaged in work or the premises where a refrigerator is in use. If a refrigerator was the only appliance driven by power that was used in the restaurant, what the statutory authorities had to decide was whether any manufacturing process was carried on with the aid of that refrigerator, that is, with the aid of the power that was needed to work that refrigerator ....

Normally refrigerator is used for the purpose of storage. Even in a restaurant articles are kept in the refrigerator till they are required for sale Mere storage as such will not be part of the manufacturing process as defined by section 2 (*k*), Factories Act of 1948... . . If, however, a refrigerator is used for treating or adopting any article with a view to its sale, then the test required by section 2 (*k*) would be satisfied .... If, however, ice-cream is made with the aid of a refrigerator like a 'Frigidaire', then the Frigidaire would have been used for making or otherwise treating or adapting the article for sale."

The decision in *Longhuest* v. *Guildford Water Board*[2] though dealing with a somewhat different set of facts, is also instructive. Here the use of power comes in at the subsequent stage, that is, after the processes of the main purpose of the factory were over Water collected from springs and streams within an area flowed by gravity into a filter house where the water was contained in filter beds and there cleansed of impurities From the filter house the water passed into a large concrete tank. There was a pump house physically separated from the filter house and three engines therein with pumps drew water from the tank, put it under pressure and forced it along mains either upto a reservoir for distribution by fall of gravity to the houses in the District or through the mains direct to the houses. Under section 151 (6) of the English Factories Act, 1937 where a place within the precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, it is deemed not to form part of the factory for the whole purpose of the Act, and the question was whether the pump house was not part of that factory, since the pumping of water was not incidental to filtering of water, but was only part of the distribution of water to consumers Lord Guest, in his speech in the House of Lords said:

"The 'processes carried on in the factory' cannot refer to any process whether it be a factory process or not It must be a process which brings the premises within the definition of a factory under section 151 (1) .....Now, the main purpose of

1. A.I.R. 1956 Mad. 600 at 602.

2. (1961) 3 All E R. 545 at 550.

the factory in the present case is the filtering of water The sole question which then arises is whether the pumping of the water is incidental to that purpose. Such storage as is merely a necessary and a transitory incident of the manufacturing process may be a factory purpose ..It was argued that the pumping of the water was a necessary incident to the filtering, but in my opinion this was a different and new process which was being carried on It was not necessary to the filtering of water that it should be pumped. All that was necessary was that it should run away by gravity from the filters. The pumping was necessitated by the fact that the reservoir was situated at a higher level than the pumping station. The pumping, in my opinion, was part of the distribution of the water and not incidental to its filtering."

The actual tanning process in the tanneries now under consideration is admittedly carried on by hand It mattered little to the tanning how the water required for cleaning was brought into the tannery premises. That aspect plays no part in the process It is not necessary for the manufacturing process carried on within the premises that the water should flow at any particular pressure Nor is it urged for the Regional Director that the tannery process requires flow of water at any particular velocity or quantity for more effective and convenient user of water in the tanning. The mere fact that water has been lifted at some point by mechanical process using power, will not itself make the manufacturing process carried on in the tannery as a process carried on with the aid of power. The use of electric energy is at too remote a point and unconnected with the actual manufacturing process to associate it with the manufacturing process and treat its user as in the course of manufacturing process We may well illustrate the absurdity of the proposition by an illustration. One can conceive of a case where water is transported from a distance for tanning purpose in cisterns mounted on carts drawn by bullocks or even by motor vehicle fitted with water tanks Water may be pumped into the cisterns or tanks with electric power It would be ridiculous to contend that the manufacturing process in the tannery is being carried on with the aid of electric power for the reason that water is pumped into the cisterns or tanks Can it make any distinction if instead of water being brought to the tanning premises as aforesaid water is led through conduit pipes from tubs near the well into which the water is pumped. We think, not If there is no distinction in such a case, the fact that the well is situated in the immediate neighbourhood of the establishment or adjacent to the establishment cannot be of much significance. The distance of the well from which water is taken, or the ownership of the intervening land in third party by itself is not a safe test. In a particular case it may emphasise or accentuate the disassociation. In *A R. Md Sulaiman* v *Regional Director of E S I Corporation*[1], the electric pump was not installled in the premises of a tannery but in land adjoining subsequently acquired. The water lifted was mainly used for the purpose of irrigation , but was also used for purposes of tanning as a supplemental source. There was a well within the premises which was not worked by electric power. The question arose whether the establishment was a factory under the Act. The learned Judge, Veeraswami, J., in rejecting the contention that the tannery is a factory, remarked :

> " It may be assumed that cleaning is a manufacturing process. But that by itself is not sufficient. Can it be said that because water which is pumped out with the aid of power is used in the process of cleaning the hides and skins, cleaning is done with the aid of power ? The respondent urged that such cleaning with such water conformed to the requisites of the definition of a factory But as I understand the definition, it is not sufficient to carry on cleaning with water pumped out from a neighbouring premises or precincts with the aid of power. "

The learned Judge observed that cleaning that is done with water pumped out with electric power is not cleaning done with the aid of power , but however distinguishes an earlier case *M .H Ismail Sahib & Co* v *Regional Director, E.S.I. Corporation*,[2] remarking only .

1. W P. No. 691 of 1959.
2. (1961) 1 M L J 16 at 17.

"But it may be seen in that case the pump-installation was within the precincts of the tannery and in that sense the learned Judge regarded it as part of the tanning process. But that is not the case here. The respondent has not been able to show that the pumping of water is done within the precincts of the factory."

In *M. H Ismail Sahib & Co* v *Regional Director, E.S I Corporation*[1], referred to above, a decision of the present Chief Justice as he then was, where electric power was employed in the establishment for the pumping and storage of water which was subsequently used for several of the processes in tanning, the reasoning for the finding that the establishment is a factory runs thus .

"Water is required for the manufacturing process, presumably at a particular spot and in particular flow of force. This is not merely a case of a small quantity of water being utilised in the ordinary way, for, in that event, the employer would not take the trouble to use electrical energy to pump and store water in large quantities, and at a height. But, since the use of the electrical energy enables the employer to utilise the water in such manner as is required in the manufacturing process itself, in effect he is using power for conducting a part of that process."

Of course if water is desired for tanning at a particular phased flow or at a given velocity and if electric power is employed for the purpose of securing water at the required flow or velocity, clearly the power is utilised in aid of the manufacturing process. But such a requirement is not made out in the cases now before us. The reasoning in the case just cited must therefore be confined to the facts of that case.

In the above case the establishment in question was held to be a factory on another ground also It was observed therein that the very pumping and storage of water in the establishment amounted by itself to a manufacturing process as defined in the Act. The learned Judge followed for the proposition the decision of Ramachandra Iyer, J. (as he then was) in *Moosa Kazimi* v *K. M Sheriff*[2] With great respect to the learned Judges we are unable to hold that the very pumping and storage of water as found should amount to manufacturing process as defined in the Act True, section 2 (*k*) of the Factories Act, while defining manufacturing process, includes in the process, pumping oil, water or sewage Section 2 (*k*) contains several sub-clauses, clauses (i) to (v) Sub-clause (i) itself is very wide in its scope and coverage ; and any one of the works enumerated therein where power is used would make the process a manufacturing process carried on with the aid of power Pumping oil, water or sewage in the context of the several sub-clauses of section 2 (*k*) can only refer to the operation of pumping itself as a substantial activity Pumping itself must be the process. There are pumping installations where oil, water or sewage, etc are pumped and power is used for the purpose of pumping. The reference must be to cases where the process of pumping is intended to aid the adaptation of the liquid for use or disposal. The manufacturing process of the establishments under consideration is tanning Pumping is not the objective or work of these establishments. Water is not processed in the establishments for storage and distribution through water mains at pressure. It cannot be contended that the place where the pumping is carried on can itself be regarded as an independent factory. At that place there may be only one man.

The case *Moosa Kazimi* v *K M. Sheriff*[2], which was followed in *M H Ismail Sahib & Co.* v. *Regional Director, E S I. Corporation*[1], was concerned with the definition of 'factory' in the Factories Act, 1948 read with Payment of Wages Act. The establishment in question was a restaurant to which a bakery was attached and the question arose whether the use of electric power for the purpose of lifting water used in the bakery and restaurant would convert the premises into a factory when more than the required number of persons worked in the premises Referring to the presence of an electric motor for the purpose of lifting water, it was observed in that case that the definition of the term 'manufacturing process' would comprehend such a case.

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1. (1961) 1 M.L.J. 16 at 17.
2. (1959) 2 L L J 344 · A I R. 1959 Mad 542.

Reliance was placed on the decision of the Bombay High Court in *Laxmibai* v. *Chairman and Trustee, Bombay Port Trust*[1], where it was observed :

" On the evidence it is clear that in the pumping station in question a process was employed for the purpose of pumping water and if such a process was employed it was a manufacturing process. "

That was a case under the Workmen's Compensation Act which also adopted the definition of 'manufacturing process' in the Factories Act and may be the evidence in that case warranted the conclusion that the pumping itself was a manufacturing process In *Moosa Kazimi's case*[2], where the establishment was a hotel with a bakery annexed the distribution of water pumped by electric power was integrally connected with the hotel and bakery business of the establishment in question A reference to section 7 of the Factories Act gives some help in the interpretation of section 2 (*k*). Under section 7 the occupier shall, 15 days before his occupation or use of any premises as a factory, send to the Chief Inspector a written notice containing certain particulars *inter alia* the name and situation of the factory, the nature of the manufacturing process carried on in the factory during the previous 12 months in the case of a factory in existence and during the next twelve months in the case of all factories and the nature and quantity of power to be used We do not think that in describing the nature of manufacturing process carried on in the factories in question a proper answer would be the pumping of water. In Maxwell on Interpretation of Statutes, 7th Edition, at page 183 it is said :

" In determining either the general object of the Legislature or the meaning of its language in any particular passage it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one."

In *A.R MD Sulaiman* v *Regional Director, E.S.I. Corporation*[3], above cited, dealing with the argument that as water used in the tannery was pumped out with the aid of electric power and pumping of water was a manufacturing process as defined by section 2 (*k*) (i) of the Factories Act, 1948 the tannery was a factory, the learned Judge, Veeraswami, J., observed :

" The difficulty in accepting the first ground pressed for the respondent lies in the fact that, although the electric pump is used as a supplemental source for supply of water to the tannery its location is not in the premises or the precincts thereof. Nor was it said that 20 or more persons are working the pump, if that alone is to be taken as the manufacturing process within the meaning of the Factories Act. In the circumstances, it cannot, therefore, be held that only because of the pumping of water with the aid of power from the land lying to the north of the premises and precincts of the tannery, the tannery is a factory within the statutory definition under the Employees' State Insurance Act. "

In *Latheef Hameed & Co* v. *Regional Director, E.S I Corporation*[4], again a case of tannery where electric power was employed for lifting water from a well, the learned Judge, the present Chief Justice, following his earlier decision in *M H. Ismail Sahib & Co* v. *Regional Director, E S.I. Corporation*[5], said :

" Learned Counsel for the writ petitioner is unable to show me any data wherefrom I can draw my inference that the force of flow of water, the height from which it is made to flow, and, the impact of water in cleaning, which is clearly due to the power of gravity, depending on the height of storage, are matters not vital to the washing process Obviously they are vital parts of it, and it is for these excellent reasons that the manufacturer, who knows best, has used electric energy to store up water at a height, so that he may have flow of water which has force and impact on the skins as part of cleaning. "

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1. A I.R. 1954 Bom 180 at 181.
2. A.I.R. 1959 Mad. 542.
3. W.P. No. 691 of 1959.
4. W P. No 1023 of 1962.
5. (1961) 1 M.L J 16.

This decision proceeds on the basis that the establishment has taken to electric power for storing of water for greater convenience and effective utilisation of water for the purpose of cleaning. On the facts as taken clearly electric power was utilised for manufacturing process The decision stands on its own facts as the former one. In line with this decision we may refer to *Newton* v. *John Stanning & Son Ltd*,[1]. In that case there was a pump house within the cartilege of the factory premises and the factory was carrying on the work of bleaching and finishing of textiles Transmission machinery was used in the pump house to pump water under pressure into the mill in the factory The question was whether the pump house was a factory under the English Factories Act, 1937 It was held that it was impossible to say that the pump house must be treated as separate from the factory, since a process was being carried on therein which was undoubtedly for or incidental to the working of bleaching and finishing of textiles It was found as a fact in that case that the pump was an essential part of the works There was no question of the pump house in that case being a separate factory on its own and it was held that the pump house was an integral part of the works.

Securing water required in a factory by electricity may in a given case be so integrated with the other processes in the tannery as to form a part of manufacturing process. The question whether in a particular case power aids the manufacturing process is a question that has to be determined on a conspectus of several factors. The dissassociation of the well and pumping from the factory premises will be an element which has to be taken into consideration The mere fact that water utilised has been pumped by electricity will not connect the pumping process with the manufacturing process carried on in a factory. There must be certain inter-linking in the functioning of the pump with the manufacturing process carried on in the factory. One can think of water being forced at pressure through the mains for the purpose of the factory. One can also conceive of water specially treated being pumped into the factory with the use of electric power.

In *P.R. Abdullah & Co* v *The Regional Director, E S I. Corporation*[2], the tannery consisted of two sets of buildings separated by a private road From a well adjacent to the godown in one of the buildings water was pumped by electricity and carried through pipes under the private road to the part of the factory where skins were tanned. The learned Judge, Ramachandra Iyer, J., (as he then was), after noticing the decision in *M H. Ismail Sahib & Co.* v *Regional Director, E S I. Corporation*[3], referred to the decision of the Division Bench in *Regional Director, E.S.I. Corporation* v. *Sriramulu*[4], and summarised the ruling in that case thus:

> " In that case it was held that the essential requisites of a factory within the meaning of the term in the Act were (1) a premises, geographical area within a certain boundary,(2) in a part of which at least manufacturing process was carried on with the aid of power and (3) twenty or more persons should be working in the premises, though it was not necessary that all the twenty persons should be working in the same section or department, so long as the efforts of all the departments were co-ordinated to achieve the main object of the factory ......"

Dealing with the case before him, it was observed :

> " But that cannot mean that where two buildings constitute a factory, from the mere circumstance that a private road intervenes between they should be viewed as two distinct premises in considering the question of the applicability of the Employees' State Insurance Act The pumping of water is essential to the manufacturing process carried on, on the side of the road. Between the two buildings, that is, one where water is pumped out and the one where it is received, there is a pipe connection which should be sufficient to constitute the two buildings as one premises ".

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1. (1962) 1 A E L R. 78
2. C M A. No. 150 of 1959.
3. (1961) 1 M.L J. 16.
4. (1960) 1 M.L J. 257.

In the above case the only question considered was whether the place where water was pumped could be considered part of the premises where tanning process was being carried on.

The questions raised and the conflicting views on the matter have been considered by Srinivasan, J, in *M S Abdulla Basha & Co* v. *Regional Director, E S I Corporation*[1]. In that case the well in question was situated at a distance of about 30 yards from the tannery and neither the well nor the pump set belonged to the tannery establishment For the establishment it was said that water was obtained on payment of a sum of Rs 20 per month to the owners of the well and the water was brought into the factory through a channel from the site of the pump set The learned Judge after noticing the decision of Veeraswami, J, in *A R Md. Sulaiman* v. *Regional Director, E S I. Corporation*[2], should govern the case while discussing the legal position, observed :

> " .... . I may express it as may view that the mere fact that water is brought into the premises with the aid of power is not by itself sufficient to establish that a manufacturing process is carried on with the aid of power If what is adumbrated by the learned Additional Government Pleader is the sole test, it is easy to conceive of a situation where this argument may lead to somewhat startling results Supposing the water required for the purpose of cleaning is secured from a source of municipal supply, that is, taken from a tap in the premises of the factory, can it be said that since the municipality supplies the water by using power in its installation, the water so received by the petitioner factory and used in some manufacturing process, the process itself is carried on with the aid of power ?"

The learned Judge also gives another illustration of water being transported to the factory premises by a lorry or other means of mechanical propulsion, the water being pumped out from a well elsewhere Pointing out that the illustrations indicate that the construction sought to be placed upon the expression 'with the aid of power' is somewhat strained, the learned Judge goes on to observe

> " What is contemplated by the definition is that power should be used in the carrying on of the manufacturing process As I understand the process involved, it consists in soaking raw hides and skins in water. It is not stated that any part of the cleaning operation is carried on with the aid of power, such as to say, by storing the water in the tanning vats by mechanical means with the aid of power or by the use of power in scraping the skins or the like associatied operations The solitary circumstance that water is pumped out of the well and stored in the vats is relied upon by the respondent in his claim that the cleaning process itself must be said to be done with the aid of power "

The learned Judge distinguishes the decision in *Regional Director, E S I. Corporation* v *Sriramulu*[3], with the observation that it principally turned upon the question whether the two premises constituted a single unit, and that it was not decided therein that the use of the water derived with the aid of power would amount to the use of power in manufacturing process Referring to the decision in *M H Ismail Sahib & Co* v *Regional Director, E S I Corporation*[4], where it was observed that the very pumping and storage of water amounted to a manufacturing process, the learned Judge observed .

> " With great respect, I am unable to follow this decision Firstly, it seems to me that the various sub-clauses of the definition of 'manufacturing process' are mutually exclusive The first sub-clause in section 2 (*k*) which defines " manufacturing process" is itself of very broad amplitude and covers a variety of processes, the carrying out of any one of which with the aid of power would make the process a manufacturing process Sub-clause (2) which reads "pumping of oil, water or

1. I L R. (1965) 1 Mad 293
2. W.P No 691 of 1959.
3. (1960) 1 M L J 257.
4. (1961) 1 M L J 16.

sewage " is in the context distinct and is intended to deal with mere pumping operations for it might otherwise be contended that since pumping *pre se* does not affect any alteration in the article no process of manufacture is at all involved. There are large pumping installations which deal with oil, water or sewage, which utilise power for the purpose of pumping and unless this part of the definition is available, such installations could not be brought within the category of factories. *Laxmibai* v. *Chairman, Bombay Port Trust*[1], was a case of that kind This sub-clause was not to my mind intended to take in an ancillary operation of pumping water as in the present case and to postulate the use of that power as covering use of power in aid of the manufacturing process itself. It is not the case of the department that water is required in a particular flow or force to serve the purpose of any of the manufacturing process involved Water in fact is required in a static condition as it were for the purpose of soaking the raw hides and skins to make them pliant and to facilitate the cleaning of the skins Had it been a case where water had to be directed in a powerful flow which could be achieved only with the aid of power, and that this kind of flow was necessary for the purpose of cleaning or any of the associated processes of manufacture, then undeniably power could be said to be used in the process of manufacture But where water is pumped for the purpose of securing its supply and nothing more and power is not used in the process of manufacture itself, it seems difficult to hold that this part of the definition would at all be attracted "

The learned Judge concludes

" Giving the matter my careful consideration, I am of opinion that unless power is directly used in the process of manufacture, the premises cannot come within the definition of ' factory ' in the Act The use of power for pumping water, which water is used for subsequent manufacturing purposes, with nothing more cannot justify the inference that the power is used in the process of manufacture "

Having given the most careful consideration to the differing views expressed in the decisions of the learned Single Judges of this Court which led Srinivasan, J., to refer W P No 1166 of 1962 to a Division Bench, we are inclined to agree with the approach of Srinivasan, J , in the application of the definition of ' factory ' to tanneries like those under consideration, that where water is pumped for securing its supply and nothing more, and power is not used in the manufacturing process itself the definition is not attracted The mere use of power for pumping water which is used for the subsequent manufacturing purposes cannot be described as the use of power in the manufacturing process. We are in concurrence with Srinivasan, J , in his view that the reference to pumping of oil, water or sewage under the definition of manufacturing process is intended to deal only with pumping installations where the main process itself is pumping of oil, water or sewage The sub-clause is not intended to cover pumping which is merely ancillary to some other manufacturing process Only, we would like to circumscribe the requirement by a limitation The question whether the manufacturing process is being carried on with the aid of power is ultimately one of inference from facts It may happen that in a particular establishment the pumping of water and utilisation of it in the manufacturing process is so integrally connected with the manufacturing process that the pumping cannot be disassociated from it May be that the actual process of tanning is carried on by manual labour All the same the pumping of water may in a given case be so intimately linked up with the manufacturing process in its location, object and operation, say as envisaged in *M H Ismail Sahib & Co* v. *Regional Director, E.S.I. Corporation*[2], to secure flow of water with force and impact for the cleansing of skins with a view to more efficient and economical working of the tannery, that it would be difficult to disassociate the pumping process from the actual tanning process The test is not whether power is necessary for the manufacturing process but whether in fact power is used in the manufacturing process The nature of the

1. A.I.R 1954 Bom. 180.

2. (1961) 1 M L J 16 at 17.

definition is such that for its application no principles in the abstract could be laid down We can only indicate the true scope of the several material expressions in the definition

We shall now examine the cases on hand in the light of the above discussion. In W P No 2652 of 1966 which is also the subject of L P A No 43 of 1964, the Additional Commissioner for Workmen's Compensation would hold the premises as a factory for the only reason that within the tannery premises there is a well and water from the well is pumped by an oil engine, that is, by the use of power. The contention of the establishment is that the water from this well is not used in the manufacturing process due to technical reasons and the water used for tanning is brought from a well outside the tanning premises. It is also the contention of the establishment that the well from which water is taken for the tannery, no doubt by the use of power, is situated in the corner of a cocoanut thope owned in common with others at a distance of nearly a furlong from the tannery premises. In the view he has taken that the presence of an oil engine attached to the pump within the tannery would itself be sufficient, the Additional Commissioner for Workmen's Compensation thought that it was not necessary for him to examine the contention on behalf of the establishment that the water is pumped from a well situated on different premises far away from the tanning premises. There is no finding even that water from the well in the tanning premises was to any extent used in the tanning process. The mere existence of the pump set worked by power cannot make the premises a factory. The requirement of the definition is not just that power is used in any part of the premises The essential postulate is that power must be used in aid of the manufacturing process in the premises There being no such finding in this case by the Additional Commissioner for Workmen's Compensation, the order in question has to be quashed

Coming to W.P. No. 1166 of 1962, in the counter-affidavit of the Regional Director, Employees' State Insurance Corporation, it is admitted that the pump set is situated outside the western compound wall of the tannery All that is stated is that the eastern embankment of the well is connected with the western wall of the tannery. The employer, it is stated, pays rent not only for the tannery but also for the open space where the well is situated It is not denied that the water from the well is taken only by an earthern channel into the tannery wherein the washing and cleaning process of the skins is done only by hands Nor is the statement in the affidavit that labourers working in the tannery have no access to the pump set which is in charge of an independent care-taker, denied The water, it is stated, is first stored in a tub near the well and the water so stored is used also for personal needs of the labourers and others, that is, for bathing and drinking purposes It is one horse power motor that pumps the water into the tub. On the facts the pumping of water has little to do with the actual tanning process It cannot be said that the pumping process is so integrated that the manufacturing process within the tannery premises as to make it part of the manufacturing process The pumping of water by power is not incidental to the tannery process which goes on within the premises In the absence of other indicia, it will be making a distinction without difference to hold that as the pump set is just outside the compound wall it must be held to be in aid of the manufacturing process The absence of distance in a case of this kind without any other clinching features shows no nexus between the manufacturing process and the pumping To differentiate between tanneries where the pump set is just outside the premises and adjoining the compound wall and tanneries where the pump set is situated at a distance, and make the former liable for contribution, will be to make a classification without any rational basis for the same It follows that the tanneries in question as worked do not fall within the scope of section 2 (12) of the Employees' State Insurance Act read with the Factories Act, 1948 and that the provisions of the Employees' State Insurance Act cannot be applied to the tanneries. A writ will issue as prayed for in W P No. 1166 of 1962 The order, dated 7th April, 1961 made by the Regional Director, Employees' State Insurance Corporation the subject of W P No. 2652 of 1966 is hereby quashed and the *rule nisi* therein made

absolute In the circumstances it is unnecessary to examine the maintainability of the appeal, C M A No 270 of 1961 L P A No 43 of 1964 is therefore dismissed. Having regard to all the circumstances, there will be no order as to costs in the writ petitions and the Letters Patent Appeal

V.K ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—MR JUSTICE P S KAILASAM

K. R Seshan . *Petitioner**

v.

The Deputy Inspector-General of Police, Southern Range, Madurai, and others *Respondents.*

Subordinate Services Rules, rule 27 (c)—Explanation III—*Termination of probation of a member of service—Departmental enquiry—Framing of a specific charge relating to past conduct—Validity—Punishment on several grounds—Some of the grounds found to be unsustainable—Punishment imposed if can be interfered with by Court*

Explanation III to rule 27 (*c*) of the Subordinate Services Rules provides that the probation of a member of a service can be terminated for general unsatisfactory work or incapacity without any need for enquiry into any specific charge. But in cases where the competent authority proposes to terminate the probation for specific charges in addition to or distinct from general inefficiency or incapacity he is required to frame specific charges and follow the detailed procedure laid down in rule 17 (*b*) of the Madras Civil Services (Classification, Control and Appeal) Rules. In an enquiry held for the purpose of termination of the probation there can be no objection to framing of a specific charge relating to the punishments accumulated by the delinquent It may be that in a case of grave misdemeanour, where the dismissal of the delinquent is in contemplation, he may be prejudiced by his past conduct being enquired into at that stage But the fact of accumulation of punishments during the period of probation is a material circumstance to be taken into account in deciding whether the probation should be terminated or not.

Where a civil servant is punished on several charges by the departmental authority and the Court finds that some of the charges are unsustainable, the Court cannot interfere if the punishment is justified by the rules and if the order can be supported on any finding for which the punishment can lawfully be imposed. In other words, if the Court is satisfied that that authority would have passed the order on the basis of the relevant and existing grounds and the exclusion of irrelevant and non-existent grounds could not have affected the ultimate opinion or decision of the authority, it will not interfere It is for the Court to be satisfied whether the authority would have passed the order on the basis of relevant and existing grounds. The question as to whether the authority has specifically stated that it would have sustained the punishment on that ground or not is not material.

State of Orissa v. *Bidyabhushan*, A I R 1963 S C 779, followed

Royal Printing Works v *Industrial Tribunal*, (1963) 2 L L J 60 and *Bank of Madura* v. *B. M. Employees' Union*, (1965) 2 L L J 44, not followed

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the first respondent made in No 150/Con/61, dated 11th January, 1963 which was confirmed in appeal by the order of the 2nd respondent made in D Dis No. 14639/AP-1/63, dated 30th September, 1963 and by the order of the 3rd respondent made in G O.Rt. No. 4109, dated 4th September, 1965 and quash the same.

* W.P. No. 1661 of 1966. 11th December, 1967.

S Rangaswami, for Petitioner.

R Krishnamurthy and *T Selvaraj*, for Government Pleader, for Respondents.

The Court made the following

ORDER.—This petition is filed by a Sub-Inspector of Police, whose probation was terminated, for the issue of a writ of *certiorari* calling for the records connected with the order of the Deputy Inspector-General of Police, dated 11th January, 1963 which was confirmed on appeal by the Inspector-General of Police on 30th September 1963 and by the Government of Madras on 4th September, 1965.

The petitioner was enlisted as a constable in 1935 and was promoted as Sub-Inspector in 1949

He was reverted in 1952 for want of vacancies Again on 8th October, 1958 he was promoted to officiate as Sub-Inspector and was put on probation for two years. On 30th May, 1960 a charge memo. was served on him by the Superintendent of Police, Ramanathapuram, and ultimately (the probation of) the petitioner was extended by one year on 5th September, 1960 by way of punishment. Again on 25th April, 1962 a charge memo. was served on the petitioner which was received by him on 20th May, 1962. Six charges were framed against him. The first charge related to unsatisfactory work while in charge of Neikuppai Station during the period from 31st March, 1959 to 16th November, 1959 Under the first charge there were four specific instances of unsatisfactory work in Neikuppai Station. The second charge related to unsatisfactory work while in charge of Manamadurai station during the period from 9th February, 1961 to 29th June, 1961, in that he delayed the submission of IV Quarterly Inspection Notes of Manamadurai station from 10th February, 1961 to 31st May, 1961 The third charge related to reprehensible conduct in giving evidence in Sub-Magistrate's Court, Srivilliputtur on 7th December, 1961 contrary to facts recorded in the case diary in Rajapalayam Taluk Station Crime No. 145 of 1961. The fourth charge related to (delay in) submission of case diaries and not submitting case diaries after F I Rs in Kalayarkoil station in several cases and the fifth charge related to non-submission of C-1 currents in various cases in spite of reminders from the Inspector of Police, Sivaganga The 6th charge was accumulation of four punishments during the period of probation as Sub-Inspector The Enquiry Officer found that all the charges had been proved against the petitioner. The Deputy Inspector-General of Police accepted the findings of the Enquiry Officer and terminated the probation of the petitioner On appeals the Inspector-General of Police agreed with the Deputy Inspector-General of Police and dismissed the appeal. A further appeal to the Government also failed and hence this writ petition.

So far as the first charge relating to unsatisfactory work while in charge of Neikuppai Station during the period 31st March, 1959 to 16th November, 1959 is concerned, it is admitted that the charges were the subject-matter of a previous enquiry which resulted in the extension of the probation of the petitioner by six months The petitioner having been punished once before charge No 1 ought not to have been again made the subject-matter of a fresh enquiry The plea of the petitioner regarding this charge will have to be accepted

Regarding charge No 2, that is delay in submission of the IV Quarterly Inspection Notes of Manamadurai station from 10th February, 1961 to 31st May, 1961, the Enquiry Officer found that the reference was pending when the delinquent took charge and it was his duty to clear off this current file or to have reported if it was not handed over to him on his taking charge In the absence of any report about this current file by the delinquent the officer inferred that the current file was at the station and as its submission was delayed by the delinquent for such a long time it was not excusable. The officer also found that the delinquent is not able to establish that this reference was among the papers taken away by his predecessor. In the result he declined to accept the explanation for the delay.

The learned Counsel for the petitioner submitted that the reasoning of the Enquiry Officer that the delinquent has not established that the reference was among the papers taken away by the predecessor is not proper as the burden is on the prosecution to prove that the paper had been left and that the paper was available with the petitioner. The Enquiry Officer accepted the evidence of P W 4 that the reference was received at the Manamadurai station as recorded in the station registers and was pending when the delinquent took charge and he ought to have attended to the clearing of the current or should have reported if it was not handed over to him on his taking charge I am unable to say that the reasoning of the Enquiry Officer is unsupportable Regarding charge No 3, that is reprehensible conduct in giving evidence in Sub-Magistrate's Court, Srivilliputtur, on 7th December, 1961 contrary to facts recorded in the case diary it is common ground that the evidence which the petitioner gave in Court was not in conformity with the case diary records. The statement of the petitioner that he recorded a statement from the first accused and recovered M O 1, recorded the confessional statement of accused 2 and in pursuance thereof seized M O 2 and then recorded the confessional statement of accused 3 and seized M O 3 is contrary to the record in the case diary which shows that confessional statements of the accused and mahazars recorded that M O 1 was recovered at 8-30 A M M O 2 at 7-30 A M and M O 3 at 7-45 A M. It is also entered in the case diary that the petitioner arrested accused 1 to 3 at Sankaralingapuram at 5 A M on 26th September, 1961 and examined them and recorded their confessional statements, from accused 1 at 5-15 A M from accused 2 from 6 to 6-30 A M and from accused 3 from 6-45 to 7-15 A M There is a clear variation between the evidence he gave in Court and the case diary records. His explanation that the evidence of the petitioner was misunderstood by the Sub-Magistrate was rightly rejected by the Enquiry Officer.

The further charge relates to delay in submission of case diaries and not submitting case diaries after F I Rs in Kalayarkoil crime numbers The finding is that the petitioner had delayed the submission of case diaries and his plea that the delay was due to his work in Courts and investigation was not accepted Charge No 5 relates to non-submission of currents in spite of reminders from the Inspector of Police, Sivaganga On this charge the Enquiry Officer found as a fact that no reminders had been sent of the currents by the Inspector but there was delay in submission of the records. Though the act of non-submission is not aggravated, as it has not been proved to have continued in spite of reminders, the charge that there was delay in submission is made out.

Regarding the 6th charge, accumulation of punishments during the period of probation the fact that the petitioner received the four punishments is not disputed. But it is contended that the Enquiring Authority was prejudiced by including this charge relating to past conduct and as such the entire enquiry is vitiated In this connection the learned Counsel, Mr. Ramaswami, referred to the Subordinate Services Rule No. 27, which provides for the termination of the probation of a person *Explanation III* to rule 27 (*c*) is the relevant rule. It provides that the probation of a member of a service can be terminated for general unsatisfactory work or incapacity without the need for enquiry into the specific charge In cases where the competent authority proposes to terminate the probation of a member for specific charges in addition to or distinct from general inefficiency or incapacity he is required to frame specific charges and follow the detailed procedure laid down in rule 17 (*b*) of the Madras Civil Services (Classification, Control and Appeal) Rules In this case, charges were framed and the matter proceeded as if for inflicting a punishment, not for termination of the probation on grounds of general unsatisfactory work or incapacity. Charge No. 3 is that the petitioner was guilty of reprehensible conduct in giving evidence contrary to the facts recorded in the case diary This charge will not be one of unsatisfactory work or incapacity That the proceedings were by way of punishment is made clear by the show cause notice given by the Deputy Inspector-General of Police, dated 11th November, 1962 in which he stated that "if no further representation was received within the stipulated time it will be consi-

dered that you have no representations to make and (orders on) the punishment roll will be disposed of on its own merits." The Deputy Inspector-General in his order dated 11th January, 1963 has stated that it was a punishment roll for cessation of probation for unsatisfactory work and reprehensible conduct Thus the termination does not appear to be for general unsatisfactory work or incapacity On the other hand, the Department proceeded to frame specific charges in addition to and distinct from general inefficiency and incapacity In an enquiry held for the purpose of terminating the probation, I do not think there can be any objection to framing of a specific charge relating to the punishments accumulated by the petitioner. It may be that in a case of grave misdemeanour, where the dismissal of the petitioner is in contemplation, the petitioner may be prejudiced by his past conduct being enquired into at that stage But the fact of accumulation of punishments during the period of probation is a material circumstance to be taken into account in deciding whether the probation should be terminated or not I do not think there can be any objection to this course as admittedly the petitioner was given ample opportunity to rebut the charge.

Mr. Ramaswami, the learned Counsel for the petitioner, submitted that in any event as charge No 1 had failed and regarding charge No 5 the charge as framed had not been established, the punishment cannot be sustained In support of this contention the learned Counsel relied on a decision of the Supreme Court in *Ram Manohar* v *State of Bihar*[1]. The Supreme Court was dealing with the case of detention Following its earlier decision in *Shibban Lal Saksena* v *State of Uttar Pradesh*[2] the Supreme Court held that as the detention order mentioned two grounds, one of which is in terms of the rule while the other is not, it could not be said to what extent the valid and invalid grounds operated in the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order of detention and therefore the order will have to be set aside.

In *State of Orissa* v *Bidyabhushan*[3], the Supreme Court was dealing with the validity of the order of the High Court, directing the Government to reconsider the order of dismissal, on the ground that of the charges framed certain charges were held to be unsustainable There were two charges against the officer in that case. The first charge related to five specific heads charging the officer with having received illegal gratification while the second related to possession of means disproportionate to his income as Sub-Registrar The High Court held that there was evidence to support the findings on heads (*c*) and (*d*) of charge No 1 and the findings on charge No. 2 The High Court was of the view that as the findings on two of the heads under charge No 1 could not be sustained the Government should be directed to decide whether on the basis of those charges proved punishment of dismissal should be maintained or else where a lesser punishment would suffice The Supreme Court held that when the findings of the Tribunal relating to two out of five heads of the first charge and the second charge were found not liable to be interfered with by the High Court and those findings establish that the respondent was *prima facie* guilty of grave delinquency the High Court had no power to direct the Government of Orissa to reconsider the order of dismissal The Supreme Court proceeded to observe that in the case in which an order of dismissal of a public servant was impugned the Court is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established In conclusion the Supreme Court held that if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. Thus this decision clearly lays down that the Court cannot interfere in the case of a sentence, provided the sentence is justified by the rules and if the order can be supported on any finding for which the punishment can lawfully be imposed.

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1. (1966) 2 S C J 549 (1966) M L J (Crl) 642 : (1966) 1 S C R 709 A I R. 1966 S C 740
2. (1954) S C J. 73 (1954) 1 M L J. (S C) 143 . (1954) S C R 418 A I R 1954 S C 179
3. (1963) Supp 1 S.C R 648 A I R 1963 S C. 779.

The decision is subsequently referred to by the Supreme Court in *State of Maharashtra* v. *B K. Takkamore*[1], and the position of law is stated thus at page 1359 :

" An administrative or quasi-judicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds and the exclusion of the irrelevant or non-existent grounds could not have affected the ultimate opinion or decision "

Therefore if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds and the exclusion of irrelevant and non-existent grounds could not have affected the ultimate opinion or decision of the authority, it will not interfere.

Mr Ramaswami, the learned Counsel for the petitioner, submitted that the decision of the Supreme Court would indicate that the order of the administrative or quasi-judicial tribunal cannot be sustained if there is nothing on the record or in the order of the authority which would indicate that on the relevant and existing grounds it would have sustained the punishment In support of this contention the learned Counsel referred to the latter portion of the judgment in which the Supreme Court referred to the wording of the show cause notice in which it was stated that several grounds jointly and severally appeared serious enough to warrant action under section 408 (1) of the Act which would imply that the administrative tribunal was willing to base the punishment on any of the grounds I am unable to accept this contention for it is made clear by the Supreme Court that it is for the Court to be satisfied whether the authority would have passed the order on the basis of relevant and existing grounds, excluding the irrelevant and non-existing grounds. The question as to whether the authority has specifically stated that it would have sustained the punishment on that ground or not is not material This is made clear in the concluding portion of the judgment where it is stated :

" We are reasonably certain that the State Government would have passed the order on the basis of the second ground alone "

The question therefore to be decided in cases where certain charges are found to be unsustainable is whether the Court would be satisfied that on the charges on the relevant and existing grounds the administrative tribunal would have passed the sentence that had been imposed.

Mr Ramaswami, the learned Counsel for the petitioner, submitted that a Bench of this Court in *Royal Printing Works* v *Industrial Tribunal*[2], has held that when the punishment meted out by the management is a consolidated one on the ground that all the charges have been proved, if two of the charges could not be validly sustained against the worker, it would follow that the punishment cannot be sustained This decision was rendered before the decision of the Supreme Court in *State of Orissa* v. *Bidyabhushan*[3] But the learned Counsel pointed out that a later Bench decision of this Court in *Bank of Madura* v *B M Employees' Union*[4], declined to accept the contention that the decision in *Royal Printing Works* v *Industrial Tribunal*[2], held anything contrary to *The State of Orissa* v *Bidyabhushan*[3] The Bench based its decision on the ground that the worker was a cashier when he was dismissed from service and the cashier who belonged to D category cannot be dismissed by the Secretary under Regulations 25 to 27 The attempt of the learned Counsel to show that the dismissal order made by the Secretary had the approval of the management and therefore the dismissal by the Secretary was valid was not accepted by the Court As the deci-

1. (1967) 2 S C J 705 A I.R. 1967 S C 1353
2. (1963) 2 L L.J. 60.
3. (1963) 1 S.C.R. (Supp.) 648: A.I.R. 1963 S C 779.
4. (1965) 2 L.L J. 44.

sion was based on this point the other observation are in the nature of *obiter dicta.* That apart, I find factually the observation of the Court that there is nothing contrary to the Supreme Court case in *State of Orissa* v *Bidyabhushan*[1], in the decision of the Madras High Court in *Royal Printing Works* v. *Industrial Tribunal*[2], is not correct. As pointed out earlier, the Supreme Court has held that in cases where the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to interfere, whereas the Bench in *Royal Priting Works* v *Industrial Tribunal*[2], has proceeded on the basis that when once it is seen that two of the three charges could not be validly sustained against the worker, it would follow that the punishment cannot be sustained. The contention of the learned mounsel based on the decisions in *Royal Printing Works* v *Industrial Tribunal*[2], and *Bank of Madura* v *B M Employees' Union*[3], cannot therefore be accepted.

The question for consideration is whether on the charges that had been made out, the Court is satisfied that the authority would have passed the order on the basis of relevant and existing grounds to the exclusion of the grounds found to be not sustainable The grounds that are made out are, the delay in submission of the IV Quarterly Inspection Notes, reprehensible conduct in giving evidence in the Sub-Magistrate's Court contrary to facts recorded in the case diary, delay in submission of case diaries, delay in submission of currents and accumulation of four punishments during the period of probation as Sub-Inspector Even accepting the contention of the learned Counsel for the petitioner, that charge No 6 should not be taken into account in imposing the punishment on the other charges, I am satisfied that the authority would have terminated the probation Charge No. 3 by itself is serious and the punishment imposed cannot be said to be excessive.

I am unable to say that the proceedings of the authorities are vitiated by any error in procedure The order terminating the probation is therefore correct and this writ petition is dismissed There will be no order as to costs.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE N KRISHNASWAMY REDDY.

Peria Mannadha Goundar *alias* Pachamuthu and others .. *Petitioners**

v

Marappa Goundar . *Respondent.*

Criminal Procedure Code (V of 1898), *section* 145 (1)—*Passing of preliminary order under—Mandatory requirements*

It is necessary under section 145 (1) of the Criminal Procedure Code that the Magistrate having jurisdiction shall make an order in writing that he is satisfied either from a police report or other information that a dispute likely to cause a breach of the peace exists and state the grounds of his satisfaction before requiring the parties concerned in such dispute to attend his Court and put in written statements This provision of making the order in writing and stating the grounds of his satisfaction appears to be mandatory. Unless the grounds are stated in the order itself, it will be difficult to test the correctness or otherwise of the order passed by the Magistrate. So the preliminary order should state clearly the reasons and grounds on which the satisfaction is based and that the Magistrate has applied his mind in passing the preliminary order.

Case-law discussed.

The section also makes it clear that the Magistrate passing a preliminary order must be satisfied that the likelihood of the breach of the peace exists *on the date*

1 (1963) 1 S C R (Supp) 648 · (1963) 1 L.L J. 239 : A I R 1963 S C 779.
2. (1963) 2 L L J 60.
3 (1965) 2 L L J. 44.

* Crl. M.P No. 2252 of 1967. 15th March, 1968.

of the preliminary order. If the preliminary order is based upon an earlier report, long before the preliminary order was passed and without any further fresh information received in respect of the dispute, it cannot be said that the Magistrate is satisfied that the likelihood of the breach of peace existed on the date of the preliminary order. The making of an order, therefore, some months after the report on which it was purported to be passed, cannot be supported.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to quash the proceedings in M.C. No. 117 of 1967 on the file of the Court of the Sub-Divisional Magistrate (Judicial), Sankari.

S. R. Srinivasan, for Petitioners.

T. S. Subramaniam, for Respondent.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER.—The petitioners have filed this petition for quashing the proceedings in M.C. No. 117 of 1967 on the file of the Sub-Divisional Magistrate (Judicial), Sankari, for the reasons mentioned in the affidavit filed by one of the petitioners. The facts which arise on this application are these.

The respondent moved the Court of the Sub-Divisional Magistate, *ex officio*, Sankari, by a petition dated 30th August, 1966 under section 145, Criminal Procedure Code, claiming that certain properties described in the petition belonged to him, that he was in possession of the lands and that the petitioners herein encroached upon his possession.

In pursuance of the said petition, the learned Magistrate called for a report from the police and the Sub-Inspector of Police, Sankari, submitted a report on 7th October, 1966.

The learned First-Class Magistrate, Sankari, passed a preliminary order under section 145 (1), Criminal Procedure Code, and issued notice to both the petitioners and the respondent on 10th April, 1967, six months after the report was placed before the Court by the police regarding the likelihood of breach of the peace.

Thereupon, the petitioners filed a petition before the Sub-Divisional Magistrate, Sankari, (to whose Court the matter has been transferred) in M.P. No. 414 of 1967 praying that the proceedings may be dropped in view of the fact that the learned Magistrate who issued a preliminary order undr section 145 (1), Criminal Procedure Code, had not stated that he was satisfied regarding the likelihood of breach of the peace. The learned Sub-Divisional Magistrate dismissed the application filed by the petitioners and issued a fresh preliminary order on 12th September, 1967 calling upon both the parties to put in written statement of their respective claims. It is, against this order this petition has been filed.

It is contended by the learned Counsel for the petitioners that the second preliminary order passed by the Sub-Divisional Magistrate, Sankari, is vitiated as he has not stated the grounds for his satisfaction as required under section 145 (1), Criminal Procedure Code, and that the said provision is mandatory and further contended that the preliminary order passed by the Sub-Divisional Magistrate on 12th September, 1967, on the report submitted by the police to the *ex-officio* First Class Magitrate, Sankari, was nearly about one year before the order was passed and that it cannot be said from the order that the learned Magistrate was satisfied that a a dispute likely to cause breach of the peace existed on the date of passing of the preliminary order.

To appreciate both the points raised by the learned Counsel, it may be necessary to refer to section 145 (1), Criminal Procedure Code, which is as follows:—

"Whenever a District Magistrte, Sub-Divisional Magistrate or Magistrate of the First Class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an

order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute *and further requiring them to put in such documents or to adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims* "

It is, therefore, necessary under section 145 (1), Criminal Procedure Code, that the Magistrate having jurisdiction shall make an order in writing that he is satisfied either from a police report or other information that a dispute likely to cause a breach of the peace exists and state the grounds of his satisfaction before requiring the parties concerned in such dispute to attend his Court and put in written statements This provision of making the order in writing and stating the grounds of his satisfaction appears to be mandatory. The words " shall make an order in writing, stating the grounds of his being satisfied " would clearly indicate that the order must be in writing and the grounds for satisfaction also must be stated Unless the grounds are stated in the order itself, it will be difficult to test the correctness or otherwise of the order passed by the Magistrate So, the preliminary order should state clearly the reasons and grounds on which the satisfaction is based and that the Magistrate had applied his mind in passing the preliminary order.

In *Nagammal* v. *Mani*[1], Anantanarayanan, Officiating Chief Justice, as he then was, held that where the preliminary order was drawn by the Magistrate merely on the information laid by the Inspector of Police about the dispute, he must be satisfied that a dispute likely to cause breach of peace exists ; and it is mandatory that he should state " the grounds of his being so satisfied " or language to similar effect must be employed to indicate that the Magistrate had applied his judicial mind to the information in coming to the conclusion that he should take action under section 145 (1), Criminal Procedure Code The learned Judge further observed that a Magistrate should not take action merely on a police report. With respect, I agree with the view expressed in this decision

In *Khudiram Mandal* v. *Jitendra Nath*[2], a Division Bench held as follows :

"Where the preliminary order under section 145 (4), Criminal Procedure Code, does not state the grounds of satisfaction as to the existence of a dispute likely to cause a breach of the peace the order is undoubtedly a defective order and if challenged in proper time, *i e*, about the time when written statements are required to be filed or evidence led, it will be corrected or set aside."

This decision takes the view that the validity of the final order under section 145, Criminal Procedure Code, could not be set aside because of omission to state the grounds in the preliminary order as such omission will be only an irregularity. But from this decision, it is clear that if an objection is taken as in the instant case at the earliest point of time, the preliminary order can be quashed

In *China Kondappa* v *Ram Row*[3], the question that arose for consideration was whether the Magistrate acted without jurisdiction in passing the final order under section 145, Criminal Procedure Code, even though there was no preliminary order passed under section 145 (1), Criminal Procedure Code It was held that it was well settled that if there was no preliminary order made at all, the subsequent proceedings culminating in the final order are vitiated and that on the other hand, if there is a preliminary order, however defective it may be, the defect would not be fatal unless it has resulted in prejudice As observed already, this decision deals with a case where the final orders under section 145, Criminal Procedure Code, were passed That was not a case where the objection was taken at the earliest stage, before the final orders were passed

The learned Counel for the respondent relied upon a decision in *Kamal Kutty* v. *Udayavarma Raja Valia Raja*[4]. It was held in that decision that an omission to

1 (1966) L W. (Crl) 101.
2. A I.R. 1952 Cal. 713.
3 (1964) 1 An W R. 24: (1964) M L J. (Crl.) 54.
4 (19 2) 23 M.L J. 499.

record grounds in the preliminary order is not a defect of jurisdiction. That decision mainly proceeds on the footing that the revision itself did not lie against the order passed under section 145, Criminal Procedure Code The decision was rendered before the amendment of section 435, clause (3), when revision would not lie against the order under section 145, Criminal Procedure Code Further, the petition in that case was filed to quash the preliminary order, after the final orders under section 145 (4), Criminal Procedure Code, were passed This decision is no longer good law after the amendment of section 435 (3), Criminal Procedure Code, by its omission in 1923

Section 145 (1), Criminal Procedue Code, makes it also clear that the Magistrate passing a preliminary order must be satisfied that the likelihood of the breach of the peace exists on the date of the prelminary order If the preliminary order is based upon an earlier report, long before the preliminary order was passed and without any further fresh information received in respect of the dispute, it cannot be said that the Magistrate is satisfied that the likelihood of the breach of peace existed on the date of the preliminary order.

The preliminary order passed by the Sub-Divisional Magistrate is as follows :

> " Whereas information has been laid before the Revenue Divisional Officer by the Sub-Inspector of Police, Sankari, that a dispute likely to cause imminent breach of peace exists concerning the land in S Nos 186/5, 186/11, 186/122 and 186/14 of Chinnagoundanur village, Sankari Taluk, which is owned by the *A* party within the local limits of this Court's jurisdiction by reason of both *A* and *B* parties claiming the ownership of the lands.
>
> I, Sri T. Balakrishnan, B A., B L., Sub-Divisional Magistrate, Sankari, after satisfying myself that there exists *prima facie* dispute regarding immovable properties between the parties which is likely to cause breach of the peace do hereby, require you both *A* and *B* parties under section 145 (1), Criminal Procedure Code, to attend my Court in person on . . September, at 11 A M and put in written statement of your respective claims as respects the actual right of ownership and of the land in question."

This order shows that the Sub-Divisional Magistrate relied upon the report submitted by the Inspector of Police before the Revenue Divisional Officer for satisfying that a breach of the peace existed on the date of passing the preliminary order. The Sub-Divisional Magistrate himself did not call for a report from the police at the time of passing the order though he found that the preliminary order passed by the *ex officio* First Class Magistrate was defective He again had fallen into an error, in perusing the report submitted by the Police Officer on 7th October, 1966. The learned Sub-Divisional Magistrate has not even stated that he perused the report and was satisfied with the existence of breach of peace It is significant to note that the preliminary order by the Sub-Divisional Magistrate was passed on 12th September, 1967, nearly about one year after the police report was submitted. The preliminary order does not say that he had any further information subsequent to the report submitted by the police that the likelihood of a breach of peace continued and on the date of the preliminary order the dispute existed A preliminary order passed long after the information the Magistrate had in respect of the breach of the peace cannot be sustained unless the Magistrate was satisfied from any further information or enquiry that a breach of the peace existed on the date of the preliminary order

In *Anadi Lal* v *Sukh Chand*[1], a Division Bench held that it was necessary for making an order under section 145 that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question. The making of an order, therefore, some months after the report on which it was purported to be passed, cannot be supported In that case, the report

1. A.I.R. 1930 Cal. 715.

by the police in respect of the breach of the peace was made on 18th January, 1926. The preliminary order was passed in July, 1926, about six months later. I respectfully agree with the view expressed by the Division Bench.

The result is that the preliminary order passed by the Sub-Divisional Magistrate has to be quashed and accordingly, it is quashed. The petition is allowed. If necessary, the learned Sub-Divisional Magistrate can go into the matter again and after enquiry, if he is satisfied that a likelihood of the breach of the peace exists in respect of the dispute over the land, he can take appropriate proceedings.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

S. V. K. N. Palaniappa Chettiar .. *Petitioner* *

v.

M. N. Rayalu Ayyar Nagaswami Aiyar & Co. through its partner M. M. S. Radhakrishna Aiyar and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 87 (2)—*Proceedings otherwise arising therefrom—Money suit instituted and decreed before the* 1955 *Act—Execution of the decree and claim petitions arising after the* 1955 *Act—Suits to set aside the order—Governed by the* 1955 *Act only—Claim suits, if arise from the money suits instituted before the* 1955 *Act.*

The petitioner filed a money suit in the 1943 and it was decreed in 1944. The petitioner in the execution proceedings attached certain properties in 1958. The claim petitions filed in respect of those properties were allowed in 1961. Thereupon the petitioner filed suits which were directed to be stamped with Court-fee under the 1955 Act. Hence the revision,

Held. The suits will be governed by the provisions of the Madras Court-fees Act of 1955.

The expression 'a proceeding arising otherwise' occurring in section 87 (2) of the Act contemplates that the proceeding, though not in the nature of appeal or revision, must nevertheless indicate the legal pursuit of remedy connected with the *lis* so that by its very nature, it may be an off-shoot of the suit or proceeding previously instituted.

A claim petition is in no way connected with the *lis* of the original suit in the execution proceedings in respect of which the claim petition arises, nor does a claim petition arise by its very nature as an off-shoot of a money suit. There is therefore no justification for holding that a suit under Order 21, rule 63 of the Code, arises out of the original suit in the execution proceedings in which a claim petition is filed. Such a suit arises only out of the claim petition or at the most from the execution proceedings in which the claim petition is filed and certainly not from the earlier money suit.

Meenakshisundara v. *Narayanaswami*, I.L.R. (1965) 2 Mad. 90 : (1965) 2 M.L.J. 449 referred and followed.

Petition under section 115 of Act *V* of 1908 praying the High Court to revise the order of the Principal Sub-Court, Madurai, in unnumbered O.S. No........of 1965—A No. 8416 of 1965—O.S. No. 240 of 1964, District Munsif Court, Madurai Town, etc.

K. S. Ramabhadra Ayyar, for Petitioner.

The Additional Government Pleader and *K. Parasaran, K. S. Desikan* and *K. Raman,* for Respondents.

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* C.R.P. Nos. 1930 and 1931 of 1965 and 2695 of 1966. 5th October, 1966.

The Court delivered the following

JUDGMENT —These three Civil Revision Petitions are by the same petitioner and arise out of orders made by the learned Subordinate Judge, Madurai, in two plaints in unnumbered original suits and by the Subordinate Judge, Sivaganga, in one plaint wherein they have held that the Court-fee payable for a suit under Order 21, rule 63, Civil Procedure Code, is payable under section 41 of the Madras Court-fees Act, 1955 and that section 87 (2) of that Act does not enable the petitioner to pay Court-fee under the Court-fees Act of 1870. There was a suit O S No 96 of 1943, which was a money suit filed by the petitioner It was decreed in 1944 In 1958 the petitioner attached certain properties and the claim petitions in respect of those properties filed under Order 21, rule 53 were allowed and thereupon the plaintiff sought to file three suits and aggrieved by the order directing him to pay Court-fee under section 41 of the Madras Court-fees Act of 1955, he has filed these three revision petitions.

The claim petitions in these cases were of the year 1961 and the execution proceedings themselves were in 1958 There is direct authority of this Court in the decision of Ramachandra Iyer, C J, in *Meenakshisundara* v *Narayanaswami*[1] It was this decision which the lower Court followed in its order It is urged on behalf of the petitioner that this decision is wrong and that the matter may be referred to a Bench, on the ground that this decision either ignores some earlier decisions or conflicts with some earlier decisions. Learned Counsel for the petitioner has referred me to the decisions in *Phulkumari* v *Ganghyami Misra*[2], *Kallinikutti Amma* v *Kunhilakshmi Amma*[3], *Arumuga* v. *Venkatachala Pillai*[4], and *Udaichand* v *Firm Pannalal Champlal*[5], which refer to the earlier decisions of the Bombay High Court in *Parvathi* v. *Kisanging*[6], and *Dhondo Sakaram Kulkarni* v. *Govind Babaji Kulkari*[7]. I am not able to see what connection those decisions have with the matter under consideration They merely decided that where a suit is filed under Order 21, rule 63, the fact that certain other reliefs are asked for in addition to the relief of setting aside the order on the claim petition does not mean that Court-fee is payable except for setting aside the claim order The decision is *Ramanathan Chettiar In re*[8], merely deals with the question as to what ' proceeding ' is. In fact, Ramachandra Iyer, C J, referred to two earlier decisions of this Court one by Panchapakesa Ayyar, J., in *Thiruvenkadasami* v *State of Madras*[9], and an earlier decision of his own in *Chakravarti* v *Collector of Madras*[10] The decision in *Thiruvengadaswami* v *State of Madras*[9] was one where the claim petition was filed before the 1955 Court-fees Act came into force and therefore it was held that as the suit arose out of a claim petition filed before the 1955 Act came into force, the Court-fee payable would be under the old Act. In fact specifically it was remarked in that decision at page 134, that

> " Proceedings taken, namely, the claim petition out of which the claim suit arose, were instituted before the commencement of the new Court-fees Act and so the Court-fee payable would be governed only by the provisions of the then (old) Court-fees Act."

This interpretation of section 87 (2) is directly against the contention taken on behalf of the petitioner Section 87 (2) reads as follows .

> "All suits and proceedings instituted before the commencement of this Act and all proceedings by way of appeal, revision or otherwise arising therefrom instituted before or after such commencement shall, notwithstanding the repeal of the Court-fees Act, 1870 (Central Act VII of 1870) and the Suits Valuation Act, 1887 (Central Act VII of 1887) be governed by the provisions of the said Acts and the Rules made thereunder "

1. (1965) 2 M L J 449 . I L R (1965) 2 Mad 90.
2. L R (1908) 35 I A 22 . 17 M L J 618 I.L R. 35 Cal 202 (P C).
3. (1947) 1 M L J 1
4. (1933) I L R 56 Mad 716 64 M L J 568
5. A.I.R 1941 Pat. 174.
6. (1881) I L R 6 Bom 567.
7. (1885) I L R 9 Bom 20
8. (1942) 1 M L J. 111
9. (1959) 72 L W 136 I.L R (1959) Mad 460 (1959) 1 M L J 151.
10. I.L R. (1960) Mad. 954.

Now the suits in this case were not either suits or proceedings instituted before the commencement of the 1955 Act Nor are they proceedings by way of appeal or revision in suits or proceedings instituted before the commencement of the 1955 Act So the only question is whether they are proceedings otherwise arising from suits or proceedings instituted before the commencement of the 1955 Act The argument on behalf of the petitioner is that as the claim petition out of which these suits arise, arose out of a money suit (O S. No 96 of 1943) this would come under section 87 (2) That suit it must be remembered was a money suit . A claim petition does necessarily arise from a money suit Execution proceedings, of course, might arise from a money suit and there may be a claim petition in execution proceedings where properties are sought to be attached Therefore, while a claim petition might be said to arise from execution proceeding it cannot be said to arise from the suit itself, especially where it is a money suit We are concerned only with the question as to what the present suits arise out of. They arise out of only the claim petition. That is the purport of the decision of Ramachandra Iyer, C J., in *Meenakshisundara* v *Narayanaswami*[1]. On behalf of the petitioner reference was made to the decision in *Ganga* v *Sundram*[2], to which reference is made by Ramachandra Iyer, J, (as he then was) in *Chakravarthi* v. *Collector of Madras*[3], The decision in *Ganga* v. *Sundaram*[2], related to the question whether a copy application in a suit disposed of before the coming into force of the 1955 Court-fees Act could be said to be a proceeding otherwise arising from a suit or proceedings instituted before the commencement of 1955 Court-fees Act and it was held that it was. It is unnecessary to stress the fact that either a copy application or an execution petition in a suit instituted before the commencement of the 1955 Act is certainly a proceeding arising from a suit instituted before that Act That decision cannot be used as authority for any purpose other than the question which is actually decided. I may also refer in this connection to a decision in *In re Abdul Gafoor*[4]. Though that was a case relating to a writ the principle of that decision is very important It is there observed that what is contemplated by the expression " a proceeding arising otherwise " is that the proceeding, though not in the nature of appeal or revision, must nevertheless indicate the legal pursuit of remedy connected with the *lis* so that by its very nature, it may be an off-shoot of the suit or proceeding previously instituted. A claim petition is in no way connected with the *lis* of the original suit in the execution proceedings in respect of which the claim petition arises, nor does a claim petition arise by its very nature as an off-shoot of a money suit. There is therefore no justification for holding that a suit under Order 21, rule 63, arises out of the original suit in the execution proceedings in which a claim petition is filed Such a suit arises only out of the claim petition or at the most from the execution proceedings in which the claim petition is filed and certainly not from the earlier money suit. I therefore agree with respect with the decision of Ramachandra Iyer, C J, in *Meenaskshisundara* v. *Narayanaswami*[1], and hold that there is no conflict between that decision and any of the decisions referred to on behalf of the petitioner and there is therefore no need to refer the question to a Bench

The three revision petitions are therefore dismissed Time for payment of Court-fee six weeks from the date of receipt of the order in the lower Court.

V S. *Petitions dismissed.*

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1. I L R. (1965) 2 Mad 90 · (1965) 2 M L J. 449.
2. '(1956) 1 M.L J. 63 . I L R (1957) Mad 97.
3. I L R (1960) Mad. 954
4. (1957) 2 An. W.R. 349 : A.I.R. 1958 A P 267.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE P. S KAILASAM.

M. Pitchaiah Reddiar and others .. *Petitioner**

v.

The Municipal Council, Madurai, represented by its Commissioners .. *Respondents.*

Madras District Municipalities Act (*V of* 1920), *section* 249, 321—*Licence fee on hotels on the basis of annual rental value—No service rendered by the municipality—Levy not a fee but a tax sustainable under Entry No.* 49, *List II, Constitution—Valid delegation of power.*

Tax and Fee—Distinction—Levy by Municipality—Licence—Terms—Terms if observed—Work done by Municipality—Not a service rendered—Not a fee—Constitution of India (1950), *Entry* 49, *List II, Schedule VII—Taxes on land and buildings.*

The levy of a licence fee under the Act in regard to hotels according to the annual rental value of the property was challenged in the writ petition on the grounds that the power to levy under the Act was without any guidance by the Legislature and that the fee levied was not commensurate with the cost of service rendered by the municipality.

Held: The licence fee levied is a tax and not a fee and the same has to be sustained as a tax on a building within Entry 49, List II of Constitution of India

Section 321 of the Act does not provide for any service of a special kind to be rendered by the municipality for the benefit of the person on whom the licence fee is imposed The work done by the municipality to supervise and see whether the terms of the licence are observed is not a service rendered to the person paying the licence fee and therefore, the licence fee cannot be upheld as a fee and as there is no provision for services being rendered, it should be considered as a tax.

The levy could be sustained as a tax on a building within Entry 49, List II of the Constitution. Section 249 of the Act empowers licensing fee to be levied on a place sought to be used for the purpose of a hotel. The licence fee is not on the hotel; but on the place and would depend on the use of the place as a hotel. The owner or an occupier of the land or building may be asked by the local board to take out a licence for his use of any place as a hotel The levy is an annual levy and not a levy for each day on the hotel business, and is not imposed on any transaction in the hotel business or on persons who come there as patrons of the hotel The levy can only be construed as a levy on the land and building and not the hotel business

The validity of the levy cannot be challenged on the ground that there is no valid delegation of the legislative power and that the delegation without fixing the rates of tax is excessive and invalid It is not unconstitutional for the Legislature to entrust the Executive with the details relating to the working of taxation laws, such as the incidence of the taxation, the rates at which it is to be charged in respect of different classes The municipality needs money for discharging its various statutory functions and its needs will vary from time to time Its power of taxation, however, is necessarily limited by the expenses required to discharge the various functions Where rates of levy are not fixed in the statute, it has to fix such rates as may be necessary to meet its needs.

It is desirable that the Government should provide the procedure for levy of tax under this head as in the case of other levy of property tax under Chapter VI to the Act.

It was held unnecessary to consider the question that the licence fee levied under the Act, being one prior to the commencement of the Constitution, should be considered as having been saved under Article 277 of the Constitution.

Case law discussed.

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* W.P. Nos. 424 etc. of 1966. 25th August, 1967.

Corporation of Calcutta v *Liberty Cinema*, (1965) 2 S C R. 477 : A I R 1965 S C 1107, referred.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records of the respondent in all the petitions herein, relating to its resolution No 2413, dated 28th December, 1965 and published in the *Madurai District Gazette*, January, 1966 Supplement, dated 8th January, 1966 and quash the same in so far as it relates to Hotels

V. Vedantachari for *S Varadarajulu Naidu, R G. Rajan* and *A. R Krishnan*, for Petitioners.

S. Chellaswami, for Respondent.

T. Selvaraj for Advocate-General, (*K. Narayanaswami Mudaliar*), for State.

The Court made the following

ORDER.—The above batch of writ petitions have been filed by persons who are running hotels within the municipal limits of Madurai, praying for the issue of a writ of *certiorari*, calling for the records of the Municipal Council, Madurai represented by the Commissioner, relating to its resolution No. 2413, dated 28th December, 1965, and published in the *Madurai District Gazette* Supplement, dated 8th January, 1966 and quash the same in so far as it relates to Hotels.

By the impugned resolution as published in the *Gazette* persons who were carrying on business as mentioned in the notification were required to pay a licence fee as specified in the notification and to conduct their business according to the conditions laid down in the licence. The notification is purported to have been made by virtue of the powers conferred under section 249 (1) of the Madras District Municipalities Act (V of 1920). Clause (*j*) relates to hotels and a licence fee is prescribed according to the annual rental value of the property. In the petitions it is alleged that the fee has been increased by several times.

The resolution of the municipal council was challenged on the ground that the power to levy a licence fee under section 249 of the Madras District Municipalities Act, 1920 is without any guidance by the Legislature and, therefore, invalid. It was also submitted that the licence fee levied was not commensurate with the cost of service rendered by the municipality.

The municipality contended that the municipal council was entitled to fix licence fees as contemplated in the Act and the fee was not intended to be a fee for services rendered and the condition that the fee should be commensurate with the services rendered had no application to the licence fee imposed In any event, it was contended that the fee imposed has a reasonable relation with the expenditure incurred by the municipality in rendering services. The stand taken by the municipal council in the counter affidavit was that the levy is nothing but a fee in the instant cases and not in the nature of a tax as alleged.

When the petitions were taken up for eharing, the municipality, as a result of the decision rendered by the Supreme Court in *Corporation of Calcutta* v *Liberty Cinema*[1], found itself unable to take the stand that the licence fee in question was a fee and not a tax. It sought to support the levy as a tax which it was competent to levy.

Section 249 (1) of the Madras District Municipalities Act provides that the Council may publish a notification in the *District Gazette* that no place within the municipal limits shall be used for any of the purpose specified in schedule V without a licence and except in accordance with the conditions specified therein. Use of a place as a hotel is prohibited under schedule V, clause (*j*) and, therefore, it is necessary that a licence should be obtained under section 249 (1) of the Act. Section 249 (2) of the Act requires the owner or occupier of any such place to apply for a

1. (1965) 2 S.C.R. 477 : A.I.R. 1965 S.C. 1107

licence for the use of such place for purposes of hotel business The executive authority may grant or refuse to grant such a licence The licence is to be valid for a year and may be renewed from year to year as specified Section 321 of the Act requires that every licence granted shall specify the period for which, and the restrictions, limitations and conditions subject to which, the same is granted Sub-section (2) of section 321 provides .—

" Save as otherwise expressly provided in or may be prescribed under this Act, for every such licence or permission, fees may be charged on such units and at such rates as may be fixed by the municipal council.

The view taken by this Court in a series of decisions was that the licence fee is a fee and cannot be imposed for the purpose of taxation but should only cover the reasonable expenses entailed by granting the licence and collecting the fees and exercising such supervision as may be necessary to see that the terms of the licence are complied with (Vide *Ramanatha Aiyar* v *The Corporation of Madras*[1] In *Corporation of Calcutta* v. *Liberty Cinema*[2], the Supreme Court was considering the question whether a licence fee on the cinema house was a fee or tax, and if it was tax, whether it could be legally maintained as a tax In construing section 548 of the Calcutta Municipal Act which is more or less similar to the provisions of section 321 of the Madras District Municipalities Act, the Court held that the levy authorised by the section was not a fee in return for services to be rendered by the corporation The Court found that the Act did not provide for service of any special kind being rendered, resulting in benefit to the persons on whom it is imposed, and the work of inspection done by the corporation which is only to see that the terms and conditions of the licence are observed by the licencee, is not a service rendered to the licencee, and therefore, there was no question of correlating the amount of the levy to the costs of any service. Negativing the contention that the levy under section 548 should be considered as a fee and not as a tax as all provisions as to taxation are contained in part IV of the Act, while this section occurred in Chapter XXXVI headed *procedure* in part VIII the Court held that consideration as to where the sections are placed in the Act were irrelevant for determining whether the levy imposed is a fee or a tax The Court observed at page 1116.

" We are clear in our mind that if looking at the terms of the provision authorising the levy, it appears that it is not for special services rendered to the person on whom the levy is imposed, it cannot be a fee wherever it may be placed in the statute .... If that levy cannot be a fee because there is no provision for service being rendered in respect of it, it would indisputably be a tax."

Section 321 of the Madras District Municipalities Act does not provide for any service of a special kind to be rendered by the municipality for the benefit of the person on whom the licence fee is imposed The work done by the corporation to supervise and see whether the terms of the licence are observed is not a service rendered to the person paying the licence fee, and, therefore, the licence fee cannot be upheld as a fee and as held by the Supreme Court, as there is no provision for services being rendered, it should be considered as a tax.

As the decision of the Supreme Court conclusively establishes that the licence fee is a tax, the learned Counsel appearing for the petitioners questioned the validity of the levy as a tax. It was contended that it is beyond the powers of the State Government to impose a tax on the business of running a hotel and, therefore if, the licence fee is construed as a tax, it is beyond the competence of the State Legislature It was further submitted that even if the State Government had power to impose a tax on hotel business, the delegation of such a power to the municipality without fixing the rate of taxation would be excessive delegation of the functions of the Legislature and as such invalid In any event, it was submitted that no sufficient guidance in the Act is given to the municipality for imposing the tax.

1. (1948) 2 M L J. 144. 2 (1965) 2 S.C R. 477 . A.I.R. 1965 S.C. 1107

The entry regarding the Local Government is List II, Entry 5 which relates to the constitution and powers of municipal corporations, and other local authorities, for the purpose of local self government or village administration It was submitted that the power of taxation is dealt with by Entries 45 to 63 in List II and none of the entries would empower imposing a tax on the issue of a licence for running a hotel on the basis of the annual rental value of the building The municipality submitted that the tax imposed would be one under Entry 49, List II being a tax on lands and buildings In support of this contention, the municipality relied on a recent decision of the Supreme Court in *Ajoy Kumar* v. *Local Board*[1]. The Local Board of Barpeta, within whose jurisdiction the Kharma Market was held, issued a notice to the appellant before the Supreme Court to take out a licence on payment of Rs 700 for the year 1965-66 for holding a market The appellant challenged the constitutionality of the impost on the ground that the Assam Legislature had no legislative competence to tax the market The Supreme Court laid down that the entries in the List have to be interpreted in the widest amplitude and if a tax can reasonably be held to be a tax on land, it will come within Entry 49 of List II. The Court observed at page 1562

> "..... . it is equally well-settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State Legislature on the ground that is a tax on income. .. It follows, therefore, that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of Entry 49 of List II, for the annual value of land which can certainly be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put "

Relying on this decision, it was contended on behalf of the municipality that though the licence fee is sought to be levied for using the building for running a hotel, it is in effect a tax on the building Though the municipality issued a notice directing the appellant to take out a licence on payment of licence fee for holding the market, the Supreme Court on an examination of the facts of the case came to the conclusion that the tax was one on land and not on the market. The charging provision in the Assam Local Self-Government Act (XXV of 1953) was section 62, and sub-section (2) of the said section is as follows .

> " On the issue of an order as in sub-section (1) the board at a meeting may grant within the local limits of its jurisdiction a licence for the use of any land as a market and impose an annual tax thereon and such conditions as prescribed by rules".

In construing the sub-section, the Court came to the conclusion that the tax was on the land , but the charge arose when the land was used as a market. Similarly, section 249 of the Madras District Municipalities Act empowers licensing fee to be levied on a place sought to be used for the purpose of a hotel The licence fee is not on the hotel , but on the place and would depend on the use of the plaec as a hotel. The owner or an occupier of the land or building may be asked by the local board to take out a licence for his use of any place as a hotel The levy is an annual levy and not a levy for each day on the hotel business The levy is not imposed on any transaction in the hotel business or on persons who come there as patrons of the hotel The levy in this case can only be construed as a levy on the land and building and not on the hotel business Thus, the licence fee imposed could be sustained as a tax on a building within Entry 49, List II of the Constitution of India.

The next challenge against the validity of the tax that is not a valid delegation of the legislative power and that the delegation without fixing the rates of tax is excessive and invalid This question is concluded against the petitioner by the Supreme Court in *Corporation of Calcutta* v *Liberty Cinema*[2] The Court quoted with approval at page 1117 the observation of the Court in *Rajnarain Singh* v. *Chairman, Patna Administration Committee*[3] thus .

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1 (1966) 2 S.C J 153 (1965) 3 S C R 473. 1107.
A I R. 1965 S C 1561 3 (1954) S C J 661 . (1954) 2 M.L J. 344 .
2. (1965) 2 S.C.R. 477. A I.R 1965. S.C. (1955) 1 S.C.R. 290.

" Now, the authorities are clear that it is not unconstitutional for the Legislature to leave it to the Executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like "

Regarding the contention the no guidance is provided for in the Act for fixation of the rates, the Supreme Court observed (page 1118) :

" It seems to us that there are various decisions of this Court, which support the proposition that for a statutory provision for raising revenue for the purposes of the delegates, as the section now under consideration is, the needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid.

Explaining the above statement, the Court observed at page 1119 as below :

" It (the corporation) has to perform various statutory functions. It is often given power to decide when and in what manner the functions are to be performed. For all this it needs money and its needs will vary from time to time with the exigencies Its power to collect tax, however, is necessarily limited by the expenses required to discharge those functions. It has, therefore, where rates have not been specified in the statute, to fix such rates as may be necessary to meet its needs "

The challenge to the validity of the tax on the ground that the rate of tax has not been fixed and that the Legislature has not given sufficient guidance has to be rejected in view of the pronouncement of the Supreme Court referred to above.

Mr. Chellaswami, the learned Counsel appearing for the municipality submitted that the *licence fee* levied under the Madras District Municipalities Act, being one prior to the commencement of the Constitution of India, should be considered as having been saved under Article 277 of the Constitution of India. In the view I have taken that the levy could be sustained as a tax, it is unnecessary to consider this question.

The stand of the municipality when it imposed the licence fee and at the time when it filed the counter affidavit in the writ petitions was that the levy is nothing but a fee in the instant cases and not in the nature of a tax as alleged. The levy is now upheld on the ground that it is a tax imposed by the Legislature under Entry 49, List II, that is a tax on property So far as imposing a tax on property, the Madras District Municipalities Act, 1920 has made elaborate provisions The levy of property tax is dealt with in Chapter VI of the Act A property tax can be levied on all buildings and lands within the municipal limits It is provided that the tax shall be levied as such at such percentage of the annual value of the land or building as may be fixed by the municipal council subject to the provisions of section 78 of the Act. The levy on lands not used for agricultural purposes is provided for under sub-section (3) to section 81 of the Act. The method of assessment is provided under section 82 Schedule IV of the Act prescribes procedure for taxation and rules (6) to (15) relate to the assessment of the tax Provisions are made in the rules for collection of tax and a provision for preferring an appeal against the assessment is also provided for.

So far as the levy of the licence fee that is imposed under section 321 of the Act is concerned, there is no elaborate procedure prescribed under the Act or the rules Though Chapter VI and the Taxation and Finance Rules have made elaborate provisions relating to levy of property tax under the various heads mentioned in section 81 of the Madras District Municipalities Act, the levy under section 321 of the Act though held to be a tax on property, the procedure that has to be followed is not one under Chapter VI, as it does not fall under any of the clauses enumerated under section 82 The fixation of the licence fee is left to the municipal council after taking into acount the various factors The fee that is leviable under section 321 of the Act was understood to be a fee for services rendered by the municipality and on that basis, the fee was being levied. Now that it has been held to be a tax, it is not neces-

sary that the fee levied should be commensurate with the services rendered by the municipality Though the validity of the levy which is held to be a tax cannot be questioned, the levy of the fee is not regulated by the elaborate procedure for the imposition of tax on property. The non-applicability of the procedure under Chapter VI is due to the fact that all along the licence fee was considered to be a fee and not a tax Though the validity of the tax imposed under section 321 of the Act cannot be challenged on the ground that it is excess delegation of legislative powers, it is needless to point out that the non-applicability of the procedure laid down for imposing the property tax is accidental It is desirable that the Government should provide the procedure for levy of tax under this head as in the case of other levy of property tax under Chapter VI On a consideration of the materials on record, I am satisfied that the levy imposed by the municipality can be maintained as a tax The municipality will not be entitled to costs as the levy is upheld as a tax and not as a fee as initially contended by it. These writ petitions are dismissed ; but in the circumstances without costs

V S ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. SRINIVASAN AND MR. JUSTICE R SADASIVAM.

K Gopalakrishnan, minor by next friend guardian father B. R. Krishnan . *Appellant**

v.

Sankara Narayanan and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 78, Schedule X, Regulation 6—Driver of a motor vehicle approaching a crossing—Duty of—Infringement of a rule of the road—How far can be relied upon to prove negligence.

Tort—Joint tort-feasors—Damages—Injury due to composite negligence of drivers of two vehicles—Claimant can sue both or any of them—Liability cannot be apportioned.

Motor Vehicles Act (IV of 1939), sections 95 (1), 110 (1) and 110 (F)—Third party insurance—Owner of scooter if bound to take out a policy to cover the claim of a pillion rider carried gratuitously—Claim for compensation against driver of a motor vehicls—If can be made before the Claims Tribunal.

Tort—Negligence—Driver of scooter causing injury to pillion rider carried gratuitously—If liable

Motor Vehicles Act (IV of 1939), sections 95 (2), 96 (2) and 100-B—Claims Tribunal—Right of insurance company to cross-examine witnesses—If restricted to defences specified in section 96 (2)—Scope and applicability of section 95 (2)—Award of damages by Claims Tribunal—Interference with the quantum of, by appellate Court—Practice—Tribunal if bound by strict rules of evidence.

The duty of a driver of a motor vehicle approaching a crossing is that he must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing. (Vide (1949) 1 All E.R. 61).

Failure to observe the rules of the road does not in itself necessarily constitute negligence and the effect to be given to such failure must necessarily depend upon the circumstances of each case. But the infringement of the driving regulations may be relied upon to show that the driver omitted to do something which a reasonable driver guided by the driving regulations contained in the tenth schedule to the Motor Vehicles Act would do and that he was therefore negligent.

Where a person is injured without any fault of his own, but by the combined effects of the negligence of the drivers of two motor vehicles, he can sue all or

* A.A.O. Nos. 358 and 398 of 1964 4th October, 1967.

any of the negligent persons It is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover, on the whole more than his whole damage In such a case the damage payable by the drivers of each of the vehicles cannot be apportioned on the basis of their respective negligence. In a judgment against joint-tort-feasors the damage awarded must be for a single sum without any apportionment among the wrong-doers.

Case law discussed

The owner of a scooter is not bound to take out a policy in respect of third party risks to cover the claims of a pillion rider carried gratuitously.

It is true that the driver of a motor vehicle is not a necessary party even in a suit for damages against the owner of a vehicle for injury or death of a person caused by the negligence of the driver. But having regard to the provisions in sections 110 (1) and 110 (*F*) of the Motor Vehicles Act the contention that in a claim petition filed before the Motor Accidents Claims Tribunal the driver is not a necessary party and that no claim could be made against him before the Tribunal, is untenable If this contention is accepted it would lead to the anomalous position of driving the claimant to have recourse to the Tribunal for his claim against the owner and the insurer and to the ordinary civil Court for the claim against the driver Such an interpetation is not warranted having regard to the clear provisions contained in section 110 (1) and 110 (*F*) of the Act The absence of a machinery in the Act to enforce the award against the driver cannot oust the jurisdiction of the Claims Tribunal to entertain the claim against the driver of the vehicle whose negligence gives rise to the claim for compensation.

The fact that the driver-cum-owner of a scooter carried a person on the pillion gratuitously cannot absolve him from liability for injury caused to the pillion rider by his negligence

The contention that before a Claims Tribunal an insurance company shall have no right to put questions to the witnesses except with reference to the grounds specified in clauses (*a*), (*b*) and (*c*) of section 96 (2) of the Motor Vehicles Act is wrong The insurance companies who are mainly responsible to satisfy the claims of third parties and who are important parties to the proceedings before the Claims Tribunal are entitled to cross-examine the witnesses on all relevant matters and their right to cross-examine cannot be restricted to the defences specified in section 96 (2) of the Act A reading of section 96 would clearly show that it was not intended to govern the enquiry before a Claims Tribunal The section contemplates proceedings before a Court and not proceedings before a Claims Tribunal.

Sub-section (2) of section 95 of the Motor Vehicles Act clearly governs only the proviso to sub-section (1) of section 95 This is clear from the terms of sub-section (2) to section 95 that they are subject to the proviso to sub-section (1) Thus, section 95 (2) can have no application to damags caused to a third party who is not one of the class of persons referred to in the proviso to section 95 (1).

The appellate Court will be loath to interfere with the quantum of damages awarded by the Claims Tribunal unless there is an error in principle in awarding damags or the damages awarded under any head is so excessive or unreasonable as to call for interference.

Held, in the instant case there was no sufficient ground or justification for the appellate Court to interfere with the award of Rs 57,865-37 as damages by the Claims Tribunal to a pillion rider of a scooter (a minor studying in the Ist year B Pharmacy course at the time of accident) who was injured by the composite negligene of the driver of the scooter who carried him and the driver of the lorry and which resulted in the amputation of his left leg above the knee

[Disallowance of damages under the head ' reduced prospects of marriage ' by the Claims Tribunal was upheld. It was observed : " if the claimant had been

incapacitated for marital life by reason of the accident, one can understand a claim for damages on that count ". Award of Rs 40 000 under the head ' prospective loss of earnings ' and Rs 2000 for future expenses for renewing the artificial limb periodically, also upheld]

There is nothing in Chapter VIII of the Motor Vehicles Act to show that the Claims Tribunal should act strictly in enforcing the Evidence Act

Appeal against the order of the Motor Accidents Claims Tribunal, Madras dated 19th September, 1964 and made in O P. No. 60 of 1964.

K K Venugopal, S. Ramalingam and *N Veeramani*, for Appellants in A.A O. No 358 of 1964

S V. B. Row, G V V Gopalaswami, S Mohan, K C Jacob, S K L Ratan, R. Srinivasan, P Venkataswami, R M Shanmugham, C R. Krishna Rao and *A Kamala Devi*, for Respondents.

C R. Krishna Rao and *A. Kamala Devi*, for Appellant in A.A.O. No. 398 of 1964.

S. V. B Row, G. V. V. Gopalaswami, K. K. Venugopal, S Ramalingam, N. Veeraswami, Nalini Vasudevan, Jacob, Ratan, P Venkataswami, C Sudarsanam, Srinivasan and *R. M. Shanmugham*, for Respondents

The Judgment of the Court was delivered by

Sadasivam, J.—On the morning of 16th December, 1963 at about 9-15 A.M, there was an accident at the Junction of St. Mary's Road and C P. Ramaswami Iyer Road, Madras in which the lorry MSY 3463 owned by T U.C S Ltd and driven by one Sankaranarayanan (R.W. 1) and the scooter, MSY 4456 owned and driven by M. K. Subramanian (R.W. 2) were involved One K. Gopalakrishnan (P.W. 10) son of Krishnan (P.W. 11) who was travelling on the pillion of the scooter at the time of the accident, sustained a lacerated injury on his left leg 10" x 5½" with fracture of both bones as the right rear wheel of the lorry ran over his left leg, after he fell down as a result of both the vehicles colliding on their sides and this finally resulted in the amputation of his left leg above the knee. The pillion-rider Gopalakrishnan claimed Rs. 3,60,210 as compensation in O P. No 60 of 1964 on the file of the Motor Accidents Claims Tribunal, Madras, (hereinafter referred to as the Tribunal) impleading R W. 1 Sankaranarayanan, the driver of the lorry of T U C S Ltd. the owner of the lorry, the Co-operative Fire and General-Insurance Society Ltd , with whom the lorry was insured, R W 2 M K Subramanian, the driver and the owner of the scooter, one A. K. Anand, the original owner of the scooter and the Oriental Fire and General Insurance Co , the insurer of the scooter, as respondents 1 to 6 respectively. The Tribunal awarded compensation of Rs 57,865 37 and costs of Rs. 100 to the claiment Gopalakrishnan only as against R.W 2, M. K Subramanian, the driver of the scooter. The pillion-rider Gopalakrishnan has preferred C M A 358 of 1964 on the ground that he should have been awarded compensation as claimed by him against all the parties R W 2 M K. Subramanian, the driver of the scooter has preferred C M A No 398 of 1964 against the award made against him. It is convenient to refer to the array of parties as described in O.P. 60 of 1964 on the file of the Motor Accidents Claims Tribunal.

The sketch, Exhibit P-1 prepared by P.W. 7 Vadivelu, Sub-Inspector of Police, Traffic Investigation who went to the spot at 10 A M on the date of the accident is useful to understand the evidence in this case According to the driver of the lorry, the sketch is incorrect. P W. 7 deposed that the driver of the scooter as well as the driver of the lorry showed him the same place, as marked in the sketch, as the point of impact of the two vehicles. But the driver of the lorry stated that he did not show to the Police the place where his lorry came into contract with the scooter It is difficult to accept his statement as against that of the Sub-Inspector of Police. It is not possible to accept the evidence of the lorry driver that when he returned to the scene of occurrence, after going to the Police Station, the lorry had been pushed forward.

The lorry was laden with 40 bags of sugar and 13 bags of wheat and it was proceeding from east to west along St Mary's Road at the time of the occurrence. The driver of the lorry deposed that he drove the vehicle at a speed of 15 to 30 kilometers which would work out approximately 9 to 18 miles per hour P W 8 Arulraj, one of the witnesses to the occurrence, deposed that the lorry, came at a great speed. But the evidence of the Sub-Inspector shows that the lorry had travelled 24 ft after the place of impact, as pointed out to him by the driver of the lorry as well as the driver of the scooter and the blood-mark noticed by him Rule 307 of the Madras Motor Vehicles Rules requires the efficiency of the brakes of the Motor Vehicles to be such that when laden, it should stop on application of brakes within a distance of 45 ft when travelling at 20 miles per hour and within 25 ft when travelling at 15 miles, per hour Thus, if the lorry had the required efficiency, which could normally be presumed as the lorry driver would otherwise have been prosecuted for driving the vehicle with inefficient brakes, the speed of the lorry at the time of the accident could have been only about 15 miles per hour. If the lorry had very efficient brakes it could have proceeded at same higher speed The scooter driven by R.W 2 was proceeding from north to south along C. P Ramaswami Iyer Road at the time of the accident. The pillion-rider P W. 10 Gopalakrishnan deposed that the fourth respondent drove the scooter at 10 to 15 m p h P W 9 Venkataramani one of the witnesses to the occurrence, stated that the scooter-driver slowed down the vehicle on approaching the junction of the roads. R W 2 M. K. Subramanian, the driver of the scooter, went to the extent of stating that he went in the first gear for about 2 furlongs from his house to the place of accident as there were lots of pot holes and the road was under repair and there were 3 or 4 inter sections to be crossed. But in the criminal Court he has stated that in C P. Ramaswami Iyer Road he picked up speed and was going at 25 m p. h and on approaching the junction of the roads, where the accident took place he, reduced the speed to 10 to 15 m p.h. and came to the first gear. The Tribunal did not accept the evidence of the scooter driver that he proceeded in the first gear. But even the driver of the lorry did not state that the scooter was driven rashly It is quite possible that the driver of the scooter drove the vehicle at 25 m p h before coming to the junction of the roads. But there is evidence to show that he slowed down the vehicle at the junction and he could not, therefore, have driven the vehicle at a speed of more than 15 miles, or 15 to 20 m p h It could not be said that either the lorry or the scooter was driven rashly.

The main question for consideration in this case is whether the driver of the lorry, or the driver of the scooter, or both, were negligent in causing the accident. It is not the case of any of the parties that the collision of the vehicles in this case was an accident, or a misfortune, for which no one could be blamed on the ground that the drivers of the vehicles were engaged in doing a lawful act, in a lawful manner by lawful means and with proper care and caution It is not disputed that the collision of the vehicles was due to negligence. But the driver of each of the two vehicles throws the entire blame on the other The case of the claimant is that the drivers of both the vehicles were negligent, though his contention is that the negligence on the part of the driver of the lorry really caused the collision and that he is primarily responsible for the grievous injury sustained by him which resulted in the amputation of the left leg above the knee The Tribunal found the driver of the scooter alone to be negligent in this case on the basis of several findings of fact given by it, but some of the findings of fact can hardly be supported.

Section 78 of the Motor Vehicles Act requires that every driver of a motor vehicle shall drive the vehicle in conformity with any indication given by a mandatory traffic sign and in conformity wiht the driving regulations set forth in the Tenth Schedule Regulations 6 and 7, among the driving regulations, contained in the Tenth Schedule, are relevant for the purpose of this case and they are as follows :—

" 6. The driver of a motor vehicle shall slow down when approaching a road intersection, a road junction or a road corner, and shall not enter any such inter-

section or junction until he has become aware that he may do so without endangering the safety of persons thereon

7. The driver of a motor vehicle shall, on entering a road intersection, if the road entered is a main road and designated as such, give way to the vehicles proceeding along that road, and in any other case give way to all traffic approaching the intersection on his right hand."

[After summarising the evidence in the case, their Lordships said:]

There can be no doubt that both the vehicles entered the intersection without regard to the other vehicles on the road, that they were close together, that each swerved to avoid collision, but that in spite of it the sides of the vehicle collided In *London Passenger Transport Board* v. *Upson*[1], Lord Porter in dealing with the duty of a driver of a vehicle approaching a crossing has observed at page 65 that

"The true position is that the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing "

Clearly the driver of the lorry in this case has failed in such duty It was not after the impact that he applied the brake for his lorry travelled 24 feet before it came to a stop. Hence he could not have stopped before reaching the crossing after he reached the point where he would have been in a position to see the scooter coming on the right

The evidence of the witnesses is no doubt not clear as to which part of the scooter and the lorry collided But this is inevitable having regard to the fact that the accident took place within a couple of seconds after the vehicles approached the intersection of the roads But the driver of the lorry has clearly violated both the driving regulations 6 and 7 of the Tenth Schedule to the Motor Vehicles Act He ought to have given right of way to the driver of the scooter, who had also approached the interesection of the roads, on his right and the mere fact that the lorry was one or two feet nearer the mid-point of the intersection of the roads than the scooter is not a sufficient ground for the driver of the lorry to disobey regulation 7.

The learned Advocate for the owner of the lorry contended that as the lorry had travelled nearly up to half the junction of the roads it is the driver of the scooter alone that could be blamed for collision The fact that the lorry had traversed nearly half the junction of the roads at the time of impact is not sufficient in the circumstances of the case to show that the driver of the lorry was not negligent. We have already pointed out that neither of the drivers of the vehicles had a look out for other vehicles on the road as required under the regulation 6 of the Tenth Schedule to the Motor Vehicles Act Further, it is clear from the evidence of the driver of the scooter that the collision took place on the northern half of St Mary's Road and this is corroborated by our finding as to the place of impact of the lorry and the scooter Thus the driver of the lorry did not keep to the left side of the road as required by the first driving regulation of the Tenth Schedule to the Motor Vehicles Act. If he had kept to the left side of the road, the accident in this case would most certainly have been averted as he would have had a clear vision of the scooter coming on the right and would also have dad ample time to give right of way to it even after seeing it. The explanation of the driver of the lorry that his view of Ramaswami Iyer Road was obstructed till he entered the intersection on account of the existence of trees and compound wall of houses to a height of six feet with hedges three feet over it is really no excuse for not obeying regulation 7 of the Tenth Schedule to the Motor Vehicles Act If the view of the lorry driver as regards the vehicles approaching on his right from C P Ramaswami Iyer Road, was really obstructed, as stated by him, it was all the more incumbent on him to have reduced the speed and driven cautiously There can be no doubt in this case tdat the driver of the lorry was negligent in not keeping to the left side of the road, in not having had a look out for vehicles coming on the right side, in not slowing down when approaching the interestection of the roads, in not sounding the

1. L.R (1949) A.C. 155: (1949) 1 All E.R. 60.

horn when approaching the intersection and in not giving the right of way to the scooter which came on his right

The learned Advocate for the claimant laid considerable stress on the violations of the driving regulations contained in the Tenth Schedule to the Motor Vehicles Act by the driver of the lorry The following passage at page 32 of " The Law of Running down cases " by Edward Terrell, clearly points out how far the infringement of rule of the road could be relied upon to prove negligence

> " The mere infringement of a rule of the road is not necessarily proof of negligence on the part of the defendant But under modern conditions of fast moving traffic any substantial infringement of the rules of driving would, it is submitted be sufficient to justify the case being left to the jury Under section 45 (1) of the Road Traffic Act, 1930, the Minister of Trasnport has prepared a Highway Code for the guidance of all persons using Highways The Code is set out in Schedule II. Under sub-section (4) a failure on the part of any person to observe any provisions contained therein may be relied upon by a party to the proceedings tending to establish or to negative any liability in question The defences of contributory negligence or inevitable accident would still be open to the defendant, but once it was proved that he had broken one of the normal rules of the road, and that this may have been the cause of the accident, then the burden of proof would have been discharged by the plaintiff "

In Beven on Negligency, Volume I at page 685 the learned author has pointed out that the person riding or driving is not bound to keep his side, yet if he does not, he must keep a better look out to avoid collision than would be necessary, if he were on the proper part of the road. He has observed that the mere facts of man driving on the wrong side of the road is *per se* no evidence of neglikent driving in an action brought for running over a person who was crossing the road on foot. The following passage at page 386 of the same book clearly shows that circumstances may warrant a deviation from the law of the road

> " In the crowded street of a metropolis . situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary
>
> In general the rule holds, and applies not merely to horses drawing carriages, but to saddle horses. Though there is one case, not unambiguously reported, which seems to bear another construction, it is clear that the fact that a person driving on the wrong side of the road indicates carelessness, and hence *prima facie* points to neglignece. Any other view would be destructive of the rule for its conformity does not raise a presumption of right conduct observances or disobediences of the rule becomes absolutely indifferent in the case of an action; as negligence having to be shown apart from the rule, the rule would be neutralised if conformity to the rule is presumably going right non-conformity would seem presumably to be not going right This *prima facie* presumption is rebuttable."

In *Joseph Eva Ltd* v *Reeves*[1], Sir Wilfred Greene, M R. has observed that failure to observe a provision of the Highway Code does not in itself necessarily constitute negligence and that the effect to be given to such failure must necessarily depend upon the circumstances of the case. He has pointed out that ' where traffics at cross roads is not regulated by a traffic light or the police, the regulation " Never overtake at crossroads " is an obvious cannon of good driving, since overtaking at unregulated cross roads necessarily involves a risk to other traffic lawfully on the highway. The same principle would apply to several of the driving regulations contained in the Tenth Schedule to the Motor Vehicles Act It is true there is no provision in the Motor Vehicles Act corresponding to section 45 (4) of the Road Traffic Act, 1930, of England which provides as follows :—

1. L R (1938) 2 K B 393: 107 L J K B 569 (1938) 2 All E.R 115 at 119

"A failure on the part of any person to observe any provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

But the infringement of the driving regulations may be relied upon by the claimant to show that the driver of the lorry omitted to do something which a reasonable driver guided by the driving regulations contained in the Tenth Schedule to the Motor Vehicles Act would do and that he was therefore negligent. The decision in *Bailey* v. *Geddes*[1], deals with the absolute statutory duty upon a motorist approaching a pedestrian crossing not to enter thereon unless he can see that there is no pedestrian upon crossing. At page 675 it is pointed out that

"It is impossible that what is done inside the crossing can be the fault or the negligence of the plaintiff himself, because, if the regulation had been obeyed, there would have been no car upon the crossing at all which could on any view, have injured the plaintiff."

It is further pointed out that once the vehicle is wrongly on that crossing, it does not lie in the mouth of the driver of that vehicle to say to the pedestrian 'You have caused this accident by your negligence,' because, if he had obeyed the regulation, the driver never would have been on the crossing It is observed in the same decision that each of these cases must depend upon a consideration of the particular language of the particular regulation.

There can be no doubt in this case that the driver of the lorry was negligent as pointed out at the end of the last but one paragraph. The Tribunal has found that the driver of the scooter was alone negligent and it was mainly on the ground that he disobeyed the traffic sign board 'Stop Listen and Go' and on the ground that it was the lorry that entered the intersection of the roads first, even when the scooter was at some distance. We have already found that there was no sign-board, and that the vehicles came to the junction of the roads almost simultaneously. It may be the driver of the scooter was perhaps also negligent to some extent in having disregarded regulation 6 of the driving regulations contained in the Tenth Schedule of the Motor Vehicles Act. There is at least some evidence of the scooter having slowed down as it necessarily should have to enable it to turn to the right but there is none at all that the lorry driver mitigated his pace The learned Advocate for the driver of the scooter contended that there was no duty on the part of the driver of the scooter to see the vehicles coming to his left as such vehicles have to give him right of way The fact that the driver of the lorry drove the vehicles on the wrong side of the road and did not give him right of way, will not justify, the negligence of the driver of the scooter in not looking out for vehicles coming on the right and in going and dashing against it.

We have pointed out that he could have stopped the scooter by applying the brakes as according to him he was going only at a slow speed and he could have stopped within three felt It may be that if the driver of the scooter has sued the driver of the lorry for damages for negligence the driver of the lorry cannot effectively plead contributory negligence as the effective cause for the collision was the negligence of the lorry driver. But so far as the claimant is concerned, he sustained a serious injury to his left leg on account of the collision of the two vehicles brought about by the combined effects of the neligence of both the driver of the lorry and the driver of the scooter, though the degree of negligence on the part of each varies considerably. Pollock's Law of Torts has dealt with it as a case of composite negligence. At page 361 of Pollock's Law of Torts by Landon, Fifteenth Edition, Pollock's treatment of the subject has been given without any revision. The following passage at page 361 is relevant to the present case.

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1. L.R. (1938) 1 K.B. 156 . 107 L.J.K.B. 38 : (1937) 3 All E.R. 671.

" Another kind of question arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons of whom the one is not responsible for the other It has been supposed that *A* could avail himself, as against *Z* who has been injured without any want of due care on his own part, of the so called contributory negligence, of a third person *B*. It is true you were injured by negligenc but it would not have happend if *B* had not been negligent also, therefore you cannot sue me, or at all events not apart from *B*. Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed It must, however, be open to *A* to answer to Z : ' You were not injured by my negligence at all, but only and wholly by *B*'s'. It seems to be a question of fact rather than of law (as, within the usual limits of a jury's discretion, the question of ' proximate cause ' is in all ordinary cases) what respective degrees of connection, in kind and degree, between the damage suffered by *Z* and the independent negligent conduct of *A* and *B* will make it proper to say that *Z* was injured by the negligence of *A* alone, or of *B* alone, or of both *A* and *B*. But if this last conclusion be arrived at, it is now quite clear that *Z* can sue both *A* and *B*".

In dealing with the plea of contributory negligence as between persons guilty ofcomposite negligence, the learned author has stated as follows at page 362 of the same book .

" The strict analysis of the proximate or immediate cause of the event, the injury who could last have prevented the mischief by the exercise of due care, is relevant only where the defendant says that the plaintiff suffered by his own negligence. Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled of course, within the limits set by the general rules as to remoteness of damage to sue all or any of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he can not recover in the whole more than his whole damage "

In *Krishnaswami Naidu* v *Narayanan*[1], a Bench of this Court dealt with a case where a passenger of a bus was killed by a collision of that bus with another bus and the legal representatives of the deceased passenger instituted a suit under Fatal Accidents Act against the owners of both the buses. It was pointed out in that case that the case would fall in the category of what is described by Mr Frederick Pollock as injury arising from ' composite negligence '. The last mentioned passage at page 362 of Pollock's Law of Torts by Landon Fifteenth edition) has been extracted in the judgement and it is observed that the principle was applied by the majority of the Court of Appeal in Ireland in *M. Kenna* v *Steppens*[2], and reference is also made to Beven on Negligence, page 79.

The observation of the Tribunal in paragraph 22 of its judgment proceeds on the assumption that R.W. 2, M. K. Subramanian, is the negligent driver. R.W. 2 M. K. Subramanian got a licence to drive scooter in August, 1961 as he had then a scooter, but he sold it in the same year. He admitted in his evidence that he had no scooter in 1962 and 1963 till he purchased the scooter from Anand five days prior to the accident on 16th December, 1963. He denied the suggestion that subsequent to his purchase he took out the scooter for driving for the first time on the date of the accident. But in the criminal Court he has stated that he took the scooter from his friend Anand for the first time on that day alone. But in the criminal Court he has stated that since 1963 he was driving the scooters of his friends. It could not be inferred from these facts alone that he is inexperienced and likely to be a negligent driver of scooter We have already referred to other circumstances to

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1. I L R. (1939) Mad. 306 . (1939) 1 M L J 143 · A I R 1939 Mad. 261.
2. (1923) 2 L R. 112.

show that the driver of the scooter was also negligent in driving the scooter so as to collide with the lorry Thus it is obvious that the collision of the vehicles which caused the grievous injury to the claimant was the result of th composite negligence of the drivers of both the vehicles

Sri C R. Krishna Rao appearing for the appellant in C M.A. No. 398 of 1964 contended that the driver of the scooter has been impleaded *qua*-driver and not as owner of the scooter and that under the provisions of Chapter VIII of the Motor Vehicles Act dealing with insurance of motor vehicles against third party risks the duty of the owner of the scooter to insure the vehicle against third party risks does not cover the case of a pillion rider carried gratuitously, that the driver of the scooter is not a necessary party to the claim and that the claim for damages or compensation against the driver of the scooter could not be determined by the Claims Tribunal. The Tribunal has found that the Oriental Fire and General Insurance Company is not liable to the claimant by reason of its having issued an insurance policy to the owner of the scooter covering third party risks for the reasons stated in paragraph 24 of its judgment The policy granted by the Insurance company in respect of the scooter has not been produced in this case. There is thus no evidence to show that the insurance of the scooter covers any liability to persons carried on the pillion seat. Under section 95 (1) of the Motor Vehicles Act a policy of insurance must be a policy which.

> "(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle in a public place "

But there is a *proviso* that a policy shall not be required to cover liability in respect of the death or bodily injury sustained by an employee arising out of and in the course of his employment The second clause of the proviso shows that it extends to persons other than passengers carried for hire or reward, or in pursuance of a contract of employment. Thus the owner of the scooter is not bound to take out a policy in respect of third party risks to cover the claim of a pillion-rider carried gratuitously. The Tribunal has rightly found, in the absence of the policy issued by the Oriental Fire and General Insurance Company covering the claim of persons like the present claimant that the said company is not liable.

The claimant impleaded M. K. Subramanian only as the driver of the scooter as made clear by the learned Advocate for the claimant before the Tribunal The reason is that he had impleaded A K. Anand, the original owner of the scooter, as the owner. But in his evidence R W 2 M K Subramanian admitted that he purchased the scooter five days prior to the occurrence and that after the purchase he is the owner of the scooter Therefore, A K Anand, the original owner of the scooter was held not liable for the claim Hence the mere fact that M K Subramanian has been impleaded as the driver of the scooter cannot affect his liability as the owner, if he is really the owner of the vehicle though he has not been impleaded in that capacity But it is really unnecessary to pursue the question whether in spite of R W 2 M K Subramanian, having been impleaded as the driver he could be held liable as the owner of the scooter in the view we are taking as regards his liability in these proceedings even as the driver

Sri C R Krishna Rao referred to the last portion of section 110-B of the Motor Vehicles Act that in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer, as supporting his contention that the award could only be against the insurer He referred to the machinery provided in section 110-E of the Act for the recovery of money due from the insurer in the same manner as an arrear of land revenue and pointed out that there is no provision for enforcing a claim against other persons He relied on the above circumstances to show that the driver of a vehicle is not a necessary party and that no claim could be made against him before a Tribunal It is true that the driver is not a necessary party even in a suit for damages against the owner of a vehicle for injury or death of a person caused by the negligenc of the driver. But, having regard to the provisions of the Act, the

contention of Sri C R. Krishna Rao is untenable. Section 110 (1) of the Motor Vehicles Act provides for the constitution of Claims Tribunal for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles Section 110-*F* of the Act provides that:

> " Where any Claims Tribunal has been constituted for any area, no civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the civil Court."

Thus the above provisions contained in sections 110 (1) and 110-*F* of the Act taken together clearly show that the Claims Tribunal wherever constituted has exclusive jurisdiction to entertain any question regarding any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area The negligent driver of the vehicle. . is primarily responsible for the damages in respect of the death of or bodily injury to persons arising out of the use of motor vehicles and the liability of the owner of the vehicle is only a vicarious liability arising out of the relationship of the master and servant It is not disputed that under the provisions contained in Chapter VIII of the Motor Vehicles Act the owner of a vehicle could be made liable. In fact, he would be liable if he fails to take out a policy covering third party risks. Under section 97 (4) (*b*) of the Act

> " If the liability of the insurer to the insured person is less than the liability of the insured person to third party, nothing in this Chapter shall affect the right of the third party against the insured person in respect of the balance."

The form of application for compensation does not specifically provide for the claimant furnishing particulars of the driver of the vehicle. But this information could be furnished against the last entry ' any other information that may be necessary or helpful in the disposal of the claim " It is true the form of application for compensation is not comprehensive In a suit for damags for injury caused by negligent driving of a vehicle the particulars of the negligence giving rise to the cause of action should be given. But it is significant to note that there is no provision in the form of application for compensation calling upon a claimant to give such particulars. In *Seethamma* v. *Benedict D'Sa*[1], it is pointed out that the prescribed form is a poor substitute for plaint. It is not possible to construe the provisions of the Act with reference to the form or even the Rules framed under the Act The provisions contained in sections 110 (1) and 110 (*f*) of the Act are comprehensive and wide enough to cover all claims for compensation in respect of the death or bodily injury to any person caused by or arising out of the use of motor vehicles.

Section 110-*B* of the Act is as follows —

> " on receipt of an application for compensation made under section 110-*A* the Claims Tribunal shall after giving the parties an opportunity of being heard, hold an enquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer."

The last portion of the above section requiring the Tribunal to specify the amount which shall be paid by the insurer refers only to one of the duties of the Tribunal. The earlier portion of the section requires the Claims Tribunal to give the parties an opportunity of being heard, hold an enquiry into the claim and make an award determining the amount of compensation which appears to be just The parties clearly include the driver and owner of the vehicle or vehicles who incurs any liability

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1. A I R. 1967 Mys. 11.

in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle.

It is true that section 100-*E* of the Act provides for recovery of money from the insurer on the Collector's certificate issued in pursuance of the award of the Claims Tribunal in the same manner as an arrear of land revenue and there is no provision in the Act for the recovery of money from the driver of the vehicle Under the Industrial Disputes Act, 1947, as it originally stood, there was no provision to recover the arrears of pay and allowances due to a workmen, though an award may reinstate him to his previous service and declare him to be entitled to the arrears of pay and allowances. In *Bilash Chandra* v. *Balmer Lawrie & Co.*[1], it has been held that the remedy provided by section 29 of the Industrial Disputes Act, 1947, by way of penalty does not deprive the individual rights of action in cases where the Award confers any personal right or benefit to particular employees for the purpose of bringing about industrial peace among the whole body of employees who are espousing the cause of the particular employee or employees and that a workman can realise the arrears of his pay and allowances to which he is declared entitled under the Award by bringing an action in a civil suit on the Award. Normally a party would be satisfied by proceeding against the insurer, but in cases like the present one, where the insurer of the vehicle could not be proceeded against, recourse should only be had, against the driver and owner of the vehicle. Even if it is assumed that Chapter VIII of the Motor Vehicles Act does not provide for the machinery to enforce the liability of the driver or owner of the vehicle as declared in the Award, it would not prevent the claimant from enforcing the claim against the said persons by filing a suit on the Award. Hence the absence of a machinery to enforce the Award against the driver cannot oust the jurisdiction of the Tribunal to entertain the claim against the driver of the vehicle. If the argument of Sri Krishna Rao is accepted, it would lead to the anomalous position of driving the claimant to have recourse to the Tribunal for his claim against the owner and the insurer and to the ordinary civil Court for the claim against the driver Such an interpretation is not warranted having regard to the clear provisions contained in sections 110 (1) and 110-*F* of the Act

In *Seethamma* v *Benedict D'Sa*[2], it has been held that a claim for compensation can be made under Chapter VIII of the Motor Vehicles Act not only against the owners of the motor vehicle and the insurer, but also against the driver whose negligence gives rise to the claim for compensation. It has been held in that decision that there is no provision in the Act forbidding recovery of compensation through the machinery provided by Chapter VIII from the driver of the vehicle who is principally responsible for the death or injury if there be negligence on his part and that the claim for compensation against him could be made only under the provisions of that Chapter to the Claims Tribunal and not to the civil Court whose jurisdiction is barred by section 110-*F* of the Act. The ratio of the decision is that having regard to section 110-*F* of the Act, the insurer could not proceed against the driver for the recovery of compensation in a civil Court and that an interpretation leading to the result that he cannot be proceeded against even before the Claims Tribunal cannot be sound. But if really no machinery is provided for in Chapter VIII of the Act, the remedy of the claimant is only to file a suit on the Award, which creates a debt against the driver of the vehicle and such a suit would not be barred by reason of section 110-*F* of the Act It is for the Legislature to make provision in Chapter VIII of the Act for enforcing claims against other parties such as the driver. Evidently no such provision has been made as a party could generally be satisfied by getting his claim enforced by proceeding summarily against the insurer on the strength of the Collector's certificate obtained in pursuance of the Award.

Sri C R. Krishna Rao urged that the claimant was only a licensee as he was carried gratuitously by the driver of the scooter and that the duty of the owner of the scooter was that owed by an occupier of premises to a licensee, namely to warn the licensee of any concealed danger of which he knows. As pointed out in

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1. A.I R. 1953 Cal 613. 2 A I.R 1967 Mys. 11 at 21

" Winfield on Tort ", Seventh Edition, at page 285, the distinction between invitees and licensees has for all practical purposes been abolished following the recommendation of the Law Reform Committee and the passing of the Occupiers' Liability Act, 1957, in England In *Harris* v *Perry & Co.*[1], it is pointed out that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises. At page 226 of the same decision, the distinction is clearly emphasised in the following terms:

> " There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation. In the case of persons received for carriage, Parke B says in *Lygo* v. *Newbold*[2]: 'A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care'. In *Austin* v. *Great Western Ry Co.*[3] Blackburn, J., says, I think that what was said in the case of *Marshall* v. *York New Castle & Burwick Ry. Co.*[4], was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely "

Hence the fact that the driver-*cum*-owener of the scooter carried the claimant gratuitously cannot absolve him of his liability for his negligence

The next question to be considered is whether the damages payable by the driver, owner and insurer of each of the vehicles could be apportioned on the basis of respective negligence of the drivers of the two vehicles. In *State of Punjab* v *Phool Kumari*[5] it has been held that where by the fault of two or more persons damage is caused, the liability to make good the damage or loss shall be proportionate to the degree to which each person was at fault The said decision of a single Judge of the Punjab High Court proceeds on the authority of *Lang* v *London Transport Executive*[6] as justifying the apportioning of liability among tort-feasors But it should be noted that the common law of England that such damages should not be apportioned except in cases coming within the admiralty jurisdiction, was changed by a statute in England in 1935 when Married Women and Tort-Feasors Act, 1935 (25 and 26 Geo. V. C. 30) was passed In ' Winfield on Tort ' Seventh Edition, at page 766 it is stated that in a judgment against joint-tort-feasors the damages awarded must be for a single sum without any apportionment among the defendants and execution for the whole of this amount can, if the plaintiff sees fit, be levied against one only of the defendants and that until the Act of 1935 the general rule was that he could get neither an indemnity for the whole of what he had paid nor contribution of an aliquot part of it The learned author has pointed out that this was laid down in *Merryweather* v. *Nixan*[7], and was extended from joint-tort-feasors to independent tort feasors causing the same damage In *Nawal Kishore* v *Rameshwar*[8], it has been pointed out that the Courts in India act on the principle of equity, justice and good conscience in matters which are not covered by statute and rely upon the principles established under the English Law to find out what the rule of justice, equity and good conscience is It has been held in that decision that clause 6 (1) (*b*) of the Married Women and Tort-feasors' Act of 1935 is not necessarily based on any principle of equity justice or good conscience and there is no justifiable reason why in the subsequent suit, if more than one suit is brought for damages against different persons, the plaintiff should be restricted to the amount decreed against one tort-feasor in his suit against the other joint tort-feasors against whom the cause of action is not only joint, but joint and several It should be observed that the principle of justice, equity and good conscience do not go varying in India every time the common

1 L R (1903) 2 K B 219 at 225
2 (1854) 9 Ex. 302 at p 305
3. L R (1867) 2 Q B. 442 at 445
4. (1851) 11 C B. 655.
5 A I R 1963 Punj. 125.
6 (1959) 1 W L R 1168 : (1959) 3 All E.R. 609
7 (1799) 8 T R 186
8 A I R 1955 All 594.

law is amended by a statute in England In *Krishnaswami* v. *Narayanan*[1], Varadachariar, J, held that there could be no apportionment of liability in cases like the present one If we were at all compelled to apportion the liability between the owners of the lorry and the scooter on the basis of English decisions rendered after the Married Women and Tort-feasors Act of 1935, we would be inclined to hold the owner of the lorry to be mainly responsible for the collision and make him liable for 9/10th of the damages and make the owner of the scooter liable only for the remaining 1/10th. But in view of the above decision no such apportionment can be made.

Sri S Mohan appearing for the Co-operative Fire and General Insurance Society, Limited, which had insured the lorry urged that the interlocutory order of the Tribunal, dated 20th July, 1964 that the Insurance Company shall have no right to put questions to the witnesses except with reference to the grounds specified in clauses (*a*), (*b*), (*c*) of sub-section (2) of section 96 of the Motor Vehicles Act is wrong. The said Society filed C.R P. No. 1659 of 1964 against the said order. But it was dismissed on the ground that the order sought to be revised was an interlocutory one and that if the proceedings were to terminate ultimately against the society, it could challenge the propriety of the order in the appeal against the Judgment. Under section 110-*B* of the Act the Claims Tribunal shall after giving the parties an opportunity of being heard, hold an enquiry into the claim and may make an award determining the amount of compensation which appears to be just and specifying the person or persons to whom compensation shall be paid by the insurer and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer. Thus the insurer is an important party in the claim before the Tribunal as the amount payable by it should be clearly specified in the award. The Claims Tribunal has restricted the rights of the insurance company to cross-examine the claimant and his witnesses on its construction of section 96 of the Act. It should be noted that section 96 of the Act was introduced several years before the constitution of the Claims Tribunal by the present section 110 of the Act. At the time when section 96 of the Act first came into force there was no Claims Tribunal. Section 96 of the Act was introduced in order to enforce the duty of insurers to satisfy judgments against persons insured in respect of third party risk by giving them notice after judgment obtained by third party against persons insured in respect of third party risk. It is only in such cases the defences open to the insurer are restricted to the grounds mentioned in section 96 (2) of the Act. A reading of section 96 would clearly show that it was not intended to govern the enquiry before a Claims Tribunal Section 96 contemplates proceedings in a Court and not proceedings before a Tribunal It contemplates notice being given to the insurer which may be before or after judgment is obtained against the person who had effected insurance for third party risk. The insurer is no doubt entitled to be made a party and defend the action on the grounds mentioned in that section But in the proceedings before a Claims Tribunal the insurer is a party. The decisions in *Vanguard Fire and General Insurance Co.* v. *Sarla Devei*[2], and *B. I G Insurance Co* v *Itbar Singh*[3], holding that an insurer is not entitled to take any defence which is not mentioned in sub-section (2) of section 96 of the Act are all decisions in which the insurers were given notice in proceedings by way of suit as contemplated under the provisions of section 96 of the Act. It has been rightly pointed out in those decisions that apart from the statute, an insurer has no right to be made a party to the action by the injured person, against the insured causing the injury and that the rights open to the insurer are therefore governed by those provided in the section. (The decisions do not relate to proceedings before a Claims Tribunal where the insurers are made parties and the scope of the defences which they want to put forward has not in any way been restricted). The contention of C R. Krishna Rao is that if section 96 could have no application to proceedings before a Claims Tribunal, it would have been

1. I.L R (1939) Mad 306 : (1939) 1 M L J. 143 : A I R. 1939 Mad. 261.
2. A.I.R. 1959 Punj. 297.
3 (1960) S C J 44 · (1960) 1 An W R (S C) 6 : (1960) 1 M L.J. (S.C)6: A.I.R. 1999 S.C. 1331.

deleted after section 110 was introduced in the Act. But the obvious answer is that it is only after a Claims Tribunal is constituted by the State Government by a notification in the Official Gazette, the civil Court's jurisdiction would be barred. There may be States where a Claims Tribunal may not have been constituted and in those States section 96 of the Act could be invoked and the insurance company could be permitted to take only the defence allowed under section 96 of the Act in respect of the judgment obtained by a third party In our opinion, the insurance companies who are mainly responsible to satisfy the claims of third parties and who are parties to the proceedings before the Claims Tribunal are entitled to cross-examine cannot be restricted to the defences specified in section 96 (2) of the Act.

The order of the Claims Tribunal, dated 20th July, 1964 is wrong. Strictly speaking, the Co-operative Fire and General Insurance Society Ltd would be entitled to recall and cross-examine the witnesses, though they had been cross-examined by the owner of the lorry But Mr. Mohan appearing for the Society fairly stated before us that he does not want to cross-examine the witnesses of the claimant as the Advocate for the owner of the lorry had effectively cross-examined the witnesses on the several points In view of this concession it is unnecessary to direct the Claims Tribunal to allow the Advocate for the Society to cross-examine the witnesses for the claimant after recalling them and to submit the said evidence to this Court for final disposal of the case. We have made observations in the earlier paragraph only for the purpose of clarifying the scope of participation in the proceedings by the insurer.

One other contention urged by Sri S. Mohan is that the liability of the insurance company is restricted to a sum of Rs. 20,000 under sub-section (2) of section 95 of the Act. But in our opinion, this contention has been rightly rejected by the Tribunal. Sub-section (2) of section 95 of the Act clearly govern only the proviso to sub-section (1) of section 95 of the Act Thus it is clear from the terms of sub-section (2) to section 95 that they are subject to the proviso to sub-section (1) Under the proviso (1) to sub-section (1), a policy shall not be required to cover liability of any such employee as is referred to therein who is (*a*) engaged in driving the vehicle or (*b*) is a conductor of the vehicle or (*c*) persons carried in a vehicle. Clause (iii) of the proviso excludes contractual liability. Subject to the said three clauses of the above proviso sub-section (2) of section 95 provides the limits of liability of the insurer to Rs 20,000 in all, in respect of the death of, or bodily injury to employees to Rs. 20,000 in respect of all passengers and Rs. 4,000 in respect of an individual passenger if the vehicle is registered to carry not more than six passengers excluding the driver In the cases of vehicles of any other class the limit is the amount of the liability incurred Thus sub-section (2) of section 95 of the Act cannot be invoked to restrict the liability of the Co-operative Fire and General Insurance Society Limited to Rs. 20,000 in this case Sub-section (2) of section 95 of the Act can have no application to damages caused to third parties like the claimant in this case as he is not one of the class of persons referred to in the proviso to section 95 (1) of the Act.

The only remaining question to be considered in these appeals is the quantum of damages The claimant assessed his damages at Rs. 3,60, 210 under eight heads. But the Claims Tribunal awarded a total compensation of Rs. 57,865-37P. At the outset we have to point out that the appellate Court will be loath to interfere with the quantum of damages awarded by the Tribunal unless there is an error in principle in awarding damages, or the damages awarded under any head is so excessive or unreasonable as to call for interference. It is enough to deal with the specific objections put forward by the parties on the question of damages.

Sri K K. Venugopal, the learned Advocate for the claimant, objects to the total disallowance of Rs. 10,000 claimed for inconvenience and loss of enjoyment and amenities. The Tribunal, was of the view that no separate compensation need be awarded under this item as it should be deemed to have been included in items 4 to 6, Sri K. K. Venugopal urged that some damages should have been awarded

under this head for reduced prospects of marriage. At page 15 of Kemp on the 'Quantum of Damages' Second Edition, it is stated that in the case of a female plaintiff serious injury or disfigurement may greatly reduce her prospects of marriage and that quite apart from other aspects of the matter which fall to be considered under the head of loss of amenities such a matter would represent a real material loss; especially in the case of a woman who regards marriage as her real prospective career and who had not been educated or trained for any thing else. It is stated in the same page that an injury which handicaps her in the marriage market-represents a real pecuniary loss. Apart from the fact that the claimant did not put forward any claim before the Tribunal on the ground that his prospect of marriage was reduced by reason of the loss of his left leg, the one answer that could be given to this claim is that it is doubtful whether the claimant would have better prospects of marriage with an artificial left leg and a sum of Rs. 57,865-37 p than with his original left leg without this sum awarded as damages If the claimant had been incapacitated for marital life by reason of the accident, one can understand a claim for damages on that count

The only other objection urged by Sri K K Venugopal is that under item 4 relating to prospective loss of earnings, the Tribunal has after computing thirty years' income as Rs 1,08,000 deducted 40 per cent. for loss of efficiency and reduced the figure to Rs 40,000 in view of the fact that the lump sum awarded as compensation, if invested, would earn interest Sri K K Venugopal referred to the passage in Kemp on the 'Quantum of Damages' at page 32, Volume 1, dealing, with a case in *Ferguson* v. *Durastic Ltd* [1], where Croom Johnson, J., assessed the prospective loss of wages at £2,500 for ten years and reduced one-fifth for the reasons indicated in his judgment. The contention of Sri K. K Venugopal is that in this case also the deduction should have been only 20 per cent not 40 per cent. But the deduction of 40 per cent. in this case is based on the evidence of P W. 6 Dr Varma as to the extent to which the claimant lost his efficiency and was therefore not normal on account of the loss of the left leg The facts of the case in *Ferguson* v *Durastic Ltd.* [1], might have justified the deduction of only 20 per cent Sri K K. Venugopal further argued that the earnings of the claimant should not have been computed for thirty years alone as he could be expected to earn at least till his retirement in his fifty-fifth year. But the claimant is now a student and he is not earning anything now. His earning capacity would arise only after he completes his course at the end of five years, and if so computed from his 25th year, the calculation of the total earnings for 30 years adopted by the Tribunal is fully justified. Thus, we are unable to uphold the above objection put forward by Sri K K. Venugopal for the claimant.

The objection urged by the owners of the scooter and the lorry is that the medical expenses and out of pocket expenses for which a sum of Rs. 6,865-37, is awarded have not been strictly proved in this case. It is true Exhibit P-5 is not the original account kept by the claimant's father, P W. 11 but only an extract from his regular accounts written by his daughter to his dictation. But the claimant has produced the vouchers Exhibit P-3 series, which the Tribunal has considered in assessing the total expenses to be allowed as Rs 4,615 37p The Tribunal has allowed Rs 250 for Nursing Home charges and Rs. 2,000 for future expenses for renewing the artificial limb periodically. We see no sufficient ground to interfere with the assessment of damages under items 1 and 2.

It is true that the sum of Rs 1,500 paid to Dr. Varma as per Voucher No. 59 has not been spoken to either by Dr. Varma or by the claimant's father P.W. 11. But it should be noted that the vouchers have all been marked by consent and treated as evidence. Further there is nothing in Chapter VIII of the Motor Vehicles Act to show that the Tribunal should act strictly in enforcing the Evidence Act. It is true the Tribunal is not in the position of an arbitrator but it is entitled to rely on the vouchers produced by the claimant and not objected to by the respondents before the Tribunal.

1. (1951) 1 Lloyd's Rep. 324.

In *H. West & Sons Ltd.* v. *Shephard*[1], the House of Lords upheld the award of general damages there having been no error in principle in assessment. It was held in that decision that the award of a sum of Rs 1,17,500 was high on the particular facts of that case But in the view of the majority judgment in that case, it was not so high as to call for interference We see no sufficient ground or justification to interfere with the sum of Rs 57,865-37 p awarded as damages.

In the result, the judgment of the Claims Tribunal is modified by making the driver of the lorry Sankaranarayanan, the owners of the lorry M/s T U C S. Ltd and the Co-operative Fire and General Insurance Society Limited, the insurer of the lorry, also liable along with the owner-driver of the scooter M K Subramanian, for the damages of Rs 57,865-37p. Sri K.K Venugopal urged that the claimant has paid Advocate fee of Rs 1,500 and that the Advocate's fee of Rs 100 allowed by the Tribunal is low. We are not inclined to interfere with the Advocate's fee of Rs. 100 fixed by the Tribunal in its discretion.

In the result C M A. No 398 of 1964 is dismissed with the costs of the claimant (one set) and C.M.A No. 358 of 1964 is allowed against the driver-owner and insurer of the lorry with costs (one set) but dismissed against A K Anand, the original owner of the scooter and the insurer of the scooter with costs. Court-fee Rs. 250.

V K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P S. KAILASAM.

Soosai Arulan and others .. *Appellants**

v.

Irudayammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 105 (2) and Order 41, rule 23 and Order 43, rule 1 (u)—Scope of—Appeal against and order of remand—Failure to appeal—Subsequent appeal at the final stage of the proceedings—If can include grounds questioning the validity of the earlier order of remand

The Civil Procedure Code, provides under Order 43, rule 1 (*u*) a separate right of appeal against an order of remand under Order 41, rule 23 Section 105 (2) of the Code expressly provides that where a person aggrieved by an order of remand fails to appeal against such an order he cannot be heard to object to the propriety or the correctness of the order or findings on which it is based, in the subsequent stages of the litigation An appeal against an order of remand would include the right to object not only to the propriety or the correctness of the order of remand but also the findings on which the order of remand is based. The correctness of an order of remand may be questioned on the ground that it is not in accordance with the provisions of Order 41, rule 23, *viz*, that the suit was not disposed of on a preliminary point. It may also be contended in such an appeal that the order of remand itself is unsustainable in law. But an appeal against an order of remand cannot be corrected into an appeal from the decree itself

Jainul Abideen Marakayar v Habibullah Sahib; (1927) 27 L W. 483; *Secretary of State for India v. Jagannadhan*, I.L.R (1941) Mad 850 (F B) (1941) 2 M L.J 47 (F.B.); *Kanakayya v. Lakshmayya*, (1950) 2 M.L J. 379, 382; *Satyacthayan v. Smit. Deorajin Dab*; (1960) 3 S C.R 590; A.I.R. 1960 S.C 941 referred to.

Appeal against the order of the Subordinate Judge of Ramanathapuram at Madurai, dated 6th April, 1962 and made in Appeal Suit No. 19 of 1962 (Original Suit No. 101 of 1958, District Munsif's Court, Ramanathapuram).

P. S. Ramachandran, for Appellants.

T. R. Srinivasan, for Respondents.

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1. L.R. (1964) A.C. 326: (1963) 2 W.L.R 1359: (1963) 2 All E R 62r.

*A.A.O. No. 157 of 1963. 2nd September, 1965.

The Court delivered the following

JUDGMENT —The defendants are the appellants in this Civil Miscellaneous Appeal. The plaintiffs filed a suit in the Court of the District Munsif of Ramanathapuram for redemption of an othi, dated 11th October, 1923, executed by one Maria Soosai and his mother Arulayee in favour of Seeni Ahammad Ghani Rowther for Rs 1,000 The first plaintiff Irudayammal claimed to be the wife and the second plaintiff, Thiresammal as the daughter of the mortgagor, Maria Soosai Plaintiffs 3 to 6 purchased some of the properties from plaintiffs 1 and 2 by sale deeds, dated 3rd March, 1958 and 10th April, 1958 It was alleged that the mortgagee was enjoying the suit properties during his lifetime, and after him his brother, the fifteenth defendant was in possession and enjoyment. The twelfth defendant is the son of the mortgagee It was further alleged that the fifteenth defendant handed over possession for consideration to one Esudayan The first defendant is the wife of Esudayan and defendants 2 to 11 are the children of Esudayan Plaintiffs 1 and 2 as heirs of the mortgagors and the other plaintiffs as purchasers from the heirs of the mortgagors claim the right to redeem the othi. They also claim that as the othi was more than thirty years ago and as the suit properties had been in possession and enjoyment of the mortgagees, the othi became wiped out as per statute

The defendants resisted the suit on various grounds. They pleaded that the first plaintiff and the second plaintiff were not entitled to the properties of Maria Soosai, as the first plaintiff even during the lifetime of Maria Soosai left him and was living with one Arokiam of Anandhana Kottai, and the second plaintiff is the daughter of that Arokiam. The defendants also claimed that the first defendant's husband purchased the suit properties othied in favour of Ahmed Seeni Rowther from Arulayee and Maria Soosai by sale deed, dated 22nd July, 1932 The defendants further contended that in any event the defendants had been enjoying the suit properties adversely to the plaintiffs for over the period of limitation, and thereby prescribed title. They also contended that the suit items 3, 7, 11, 24 and 28 never belonged to the plaintiffs and claimed title to items 3, 7, and 11 by purchase.

The trial Court found that plaintiffs 1 and 2 were not the heirs of Maria Soosai and, therefore, they were not entitled to file a suit for redemption, that the father of defendants 2 to 6 had purchased the suit properties and redeemed to othi from the fifteenth defendant, that they prescribed title by adverse possession and that items 3, 7, 11, 24 and 28 never belonged to the plaintiffs.

On appeal by the plaintiffs, the learned Subordinate Judge of Ramanathapuram found that the first plaintiff is the widow and the second plaintiff, the daughter of Maria Soosai, that they were entitled to inherit the properties and to redeem the othi, that the alleged sale of the suit properties in favour of the second defendant's father was not true, that the defendants have not prescribed title by adverse possession that items 3, 7 and 11 belonged to the plaintiff and that the defendants could not resist redemption of those items. On these findings the lower appellate Court set aside the decree of the trial Court, allowed the appeal and remanded the suit to the Lower Court directing it to frame an issue whether the mortgage debt was wiped out as per the provisions of the Agriculturists Relief Act and if not for the determination of the amount payable to the defendants, as this issue was not decided by the trial Court during the trial.

The defendants have preferred this Civil Miscellaneous Appeal challenging the order of remand. In this appeal the appellants seek to attack all the findings of the lower appellate Court. It was urged on behalf of the appellants that the lower appellate Court ought to have found that the plaintiffs were not the wife and daughter and therefore not entitled to redeem the othi, that the defendants had purchased the suit items, that they have prescribed title by adverse possession and that the other items did not belong to the plaintiffs. Learned Counsel for the appellants contended that it is open to him to contest in this Court all the findings of the lower appellate

Court on questions decided against them, which, if decided in their favour, would have obviated the order of remand. On the other hand learned Counsel for the respondents submitted that the appellants are entitled in an appeal against the order of remand to dispute its correctness alone and are not entitled to challenge the other findings, which were decided against them. On the contentions raised the scope of an appeal against an order of remand arises for determination.

Order 41, rule 23, Civil Procedure Code, provides that when a suit is disposed of upon a preliminary point and when the decree is reversed in appeal and when the appellate Court in reversing or setting aside the decree in appeal considers it necessary in the interest of justice to remand the case, the appellate Court may by order remand the case. Order 43, rule 1 (*v*) provides an appeal from an order passed under Order 41, rule 23. Section 105 (2), Civil Procedure Code, provides that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. Section 105 (2) therefore, enables the appellant against the order of remand to dispute the correctness of the order of remand. The correctness of the order of remand may be questioned on the ground that it is not in accordance with Order 41, rule 23, in that the suit was not disposed of upon a preliminary point or that it was not necessary in the interests of justice to remand the case in reversing or setting aside the decree. It may be open to contend that the order of remand itself is unsustainable, as for instance in this case, it may be submitted that the order directing the trial Court to decide whether the mortgage debt is wiped out under the Agriculturists Relief Act itself is unsustainable in law. The grounds of challenge abovementioned would be disputing the correctness of the order of remand. A wider interpretation of the words *disputing the correctness of the order of remand* may embrace challenging all findings, which were decided against the appellant, and which, if found in his favour, would obviate an order of remand. The Courts have not accepted either the restricted interpretation pleaded for by the respondents or the wider interpretation pleaded for by the appellants. In *Jainul Abideen Marakayar* v. *Habibulla Sahib*[1], the trial Court disposed of a suit on a mortgage to enforce a covenant for pre-exemption in favour of the plaintiff in the mortgage deed. According to the covenant, the mortgagor agreed that in the event of his selling the mortgaged properties within the period fixed in the mortgage bond for the payment of the mortgage debt, he should offer them for sale at the then market rate in the first instance to the plaintiff. The first defendant sold the mortgaged properties to his wife by a registered sale deed. The plaintiff in that case also contended that the purchaser, the wife, had notice of his right of pre-emption and, therefore, the sale in her favour was not valid. On behalf of the defendants it was submitted that there was no agreement to sell the property to the plaintiff and that in any event it was unenforceable, as it was not supported by consideration. It was also pleaded that the property was conveyed by the first defendant to his wife not by sale but by gift. It was further contended that the second defendant was a *bona fide* purchaser without knowledge of the agreement in the plaintiff's favour. The trial Court found in the plaintiff's favour that under the mortgage deed he had a valid covenant for pre-emption in respect of the mortgaged properties, if the mortgagor wanted to sell those properties within the period fixed for redemption of the mortgage. The trial Court found further that the conveyance in favour of the second defendant by the first defendant was in the nature of a gift and, therefore, the plaintiff had no cause of action and dismissed the suit. Because of this finding the trial Court did not consider the issue whether the second defendant took the conveyance in her favour with the knowledge of the first defendant's agreement with the plaintiff for pre-emption. In the appeal the learned Subordinate Judge upheld all the findings of the trial Court in favour of the plaintiff. It also held that the conveyance by the first defendant to the second defendant was a sale and not a gift and, therefore, the plaintiff had a right to enforce his right of pre-emption against her, if she had

1. (1927) 27 L.W. 483.

purchased with the knowledge of the agreement. But as the question of the purchase by the second defendant with the knowledge of the agreement of pre-emption in favour of the plaintiff was not considered by the trial Court, the lower appellate Court remanded the suit for fresh disposal after trying the question of knowledge. The defendants preferred an appeal to the High Court against the order of remand and sought to contest all the findings of the appellate Court against them, which if found in their favour, would have obviated the remand. It was held that section 105 (2) confined the scope of the appeal to the question of the correctness of the order of remand which might be impecahed either on the ground that the remand itself was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court was erroneous, and that no other questions could be raised in the appeal, whatever bearing they might have upon the merits of the appellant's case. It was further observed (at page 486) :

> "If such a second appeal comes to be preferred the only question which cannot be re-agitated in second appeal by reason of section 105, sub-section (2) is the correctness of the finding on the point upon which the order of remand had been made."

The Court declined to accede to the appellants' contention that he could challenge all the findings against them as that would have the effect of converting the appeal against the order of remand into an appeal from the decree itself. The Court was of the opinion that the only point which might be raised in the appeal was the correctness of the finding of the Subordinate Judge that the conveyance by the first defendant in favour of the second defendant was a sale and not a gift as held by the trial Court. The scope of an appeal against an order of remand as laid down in this decision is with regard to not only disputing the correctness of the order of remand but also the correctness of the finding upon which the order of remand had been made. This decision was approved by a Full Bench decision of this Court in *Secretary of State for India* v. *Jagannadhan*[1]. In the case before the Full Bench the plaintiff filed a suit against the Secretary of State for India for a decree for Rs. 426, which, according to him, was unlawfully collected from him as arrears of tax in pursuance of a notification. On behalf of the Secretary of State it was contended that the civil Court had no jurisdiction to try the suit. The trial Court rejected this contention and held that the Court had jurisdiction and that the notification which empowered the Government to collect the tax was invalid. The State preferred an appeal, and the appellate Court concurred with the findings of the trial Court holding that the civil Court had jurisdiction and that the notification relied on by the Government was not valid. The Government sought to justify the collection of tax relying on an earlier notification. On the Government's request the lower appellate Court remanded the suit calling for a finding as to the validity of the earlier notification. The trial Court held hat the earlier notification was also invalid and passed a fresh decree. The State appealed but the lower appellate Court concurred with the finding of the civil Court and dismissed the suit. The State in a second appeal sought to question the jurisdiction of the civil Court, but was met with the plea that the State having failed to prefer an appeal against the order of remand was barred under section 105 (2) from qustioning the correctness of the decision of the lower appellate Court holding that the civil Court had jurisdiction to try the case. The Full Bench held that the State was not aggrieved by the order of remand and that there was no gorund for appeal and that it would be monstrously unjust to hold that the State was precluded from raising the question of jurisdiction. It upheld the right of the State to question all the decisions made by the lower appellate Court except the decision with regard to the order of remand. The Full Bench approved the decision in *Jainul Abideen Marakayar* v. *Habibulla Sahib*[2], holding that an order of remand might be impeached on the ground that it was illegal as the decision of the first Court was not

1. (1941) 2 M.L.J. 47 : I.L.R. (1941) Mad. 850 (F.B.).
2. (1927) 27 L.W. 483.

on a preliminary point, or on the ground that the decision of the preliminary point by the first appellate Court was erroneous. In considering the scope of an appeal against an order of remand Viswanatha Sastri, J, in *Kanakayya* v. *Lakshmayya*[1] has stated thus:

"A separate right of appeal is provided against such an order (order of remand). Not only is a right of appeal provided by Order 43, rule 1, clause (*u*) but an obligation is cast by section 105 (2), Civil Procedure Code, upon a person dissatisfied with an order of remand to appeal against it on pain of losing his right to object to the propriety or the correctness of the order or the findings on which it is based in the later stages of the litigation."

In *Satyadhayan* v *Smt. Deorajin Dabi*[2], the Supreme Court has held at page 946 as follows:—

"A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision."

The scope of an appeal against an order of remand as laid down by *Jainul Abideen Marakayar* v. *Habibulla Sahib*[3], and approved by the Full Bench in *Secretary of State for India* v *Jagannadhan*[4], and as explained in *Kanakayya* v. *Lakshmayya*[1], would include the right to object not only the propriety or the correctness of the order of remand but also the findings on which the order of remand is based.

In this case the lower appellate Court reversed the findings of the trial Court and held that plaintiffs 1 and 2 were the wife and daughter of the mortgagor and were entitled to redeem, that the defendants had not purchased the suit items, that they had not prescribed title by adverse possession and that the several items, which they contended did not belong to the plantiffs, belonged to the plaintiffs. It was contended by Mr. P S. Ramachandran, learned Counsel for the appellants that the findings on which the order of remand is based would include the finding that the plaintiffs are the heirs of the mortgagor, the finding that the defendants did not purchase the mortgaged property, the finding that they have not prescribed title by adverse possession and the finding that the property belonged to the plaintiffs. It is no doubt true that if the findings regarding the purchase by the defendants of the mortgaged property and the defendants prescribing the title by adverse possession were found in favour of the appellants, it would have obviated the order of remand. But it cannot be said that the order of remand was based on these findings. The lower appellate Court, as it reversed the findings of the trial Court and held that the plaintiffs were entitled to redeem the property, found it necessary to remand the suit for fresh disposal on an issue, which was not decided by the trial Court. The order of remand, is, therefore, based on the finding that the plaintiffs, who are the heirs of the mortgagor, are entitled to redeem. In the appeal the appellants can only question the correctness of the findings that the plaintiffs are the heirs and they are entitled to redeem. The correctness of the other findings cannot be challenged in this Civil Miscellaneous Appeal but can only be questioned in a second appeal that may arise out of the decision of the appellate Court against the judgment of the trial Court on remand.

The question as to the correctness of the order of remand on the finding that the plaintiffs are entitled to redeem will have to be considered.

The trial Court found that the first plaintiff is not the wife and the second plaintiff not the daughter of Maria Soosai. In coming to that conclusion, the trial Court relied on Exhibit B-2 an application alleged to have been made by the first plaintiff to the Government Tahsildar claiming evacuee allowance In Exhibit B-2,

1. (1950) 2 M L J 379, 382
2. (1960) 3 S C R. 590 A.I R. 1960 S C. 941.
3. (1927) 27 L W. 483.
4. (1941) 2 M L.J 47. I L R (1941) Mad. 850 (F.B).

it is stated that the first plaintiff is the wife of Arokiam and that herself, her parents and daughter are in great difficulties and evacuee allowance might be granted to them The trial Court accepted Exhibit B-2 as clearly establishing that the first plaintiff was the wife of Arokiam The lower appellate Court declined to accept Exhibit B-2, as, in its opinion, it was not satisfactorily proved that P W. 4 filed Exhibit B-2 Exhibit B-2 was not put to P.W. 4 in her evidence and asked whether she affixed her thumb-impression to Exhibit B-2 According to the defendants, Maria Soosai married the first plaintiff and after marriage she deserted her husband and was living with Arokiam, and that the second plaintiff was born to Arokiam and the first plaintiff By this plea it is clear that the defendants admitted that Maria Soosai married the first plaintiff The burden will be on the defendants to prove that there was a divorce and after the divorce the first plaintiff married Arokiam. There is no evidence whatsoever to establish a divorce and a subsequent marriage with Arokiam. Even if the entire story of the defendants is believed, it may suggest that the first plaintiff was living with Arokiam As the second plaintiff was born during the continuance of the marriage between Maria Soosai and the first plaintiff her legitimacy cannot be questioned It is also pointed out that in the witten statement also the defendants did not dispute the fact that plaintiff 1 is the wife and plaintiff 2 is the daughter of Maria Soosai. The finding that plaintiff 1 is the wife and plaintiff 2 is the daughter of Maria Soosai and that they are, therefore, entitled to redeem is correct and is confirmed.

The order of remand is confirmed and the trial Court will proceed to frame the issue, whether the mortgage debt was wiped out, as per the provisions of the Agriculturists Relief Act, or what or any amount is due to the defendants, and dispose of the matter according to law There will be no order as to costs in this appeal

Leave to appeal granted

R M. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE M NATESAN.

M G. Natesa Chettiar . *Appellant**

v.

The Madras State Electricity Board, by its Superintending Engineer, Mettur Electricity System, Mettur Dam . *Respondent*

Civil Procedure Code (V of 1908), *Order* 29, *rule* 1—*Superintending Engineer, Mettur Electricity System, signing and verifying the plaint—Plaintiff Electricity Board, a body corporate coming into existence on* 1*st July,* 1957—*Superintending Engineer, if a Principal Officer of the Corporation who could depose to the facts of the case.*

Practice—Cause title—The Madras State Electricity Board by the Superintending Engineer—Mettur Electricity System—Electricity Board, the plaintiff in substance and de facto—*Use of the preposition "by"—Defect, purely one of form*

Contract for supply of electricity—Provision for payment of minimum sum, whether the electricity was consumed or not—Stipulation for the minimum guarantee, if a penalty clause or, predetermined damages for breach by the consumer—Minimum rent to cover the actual and the right to use the current—Minimum charge not an unreasonable levy.

The plaint has been signed and verified by the Superintending Engineer, Mettur Electricity System The plaintiff Board came into existence on the 1st of July, 1957, under the Electricity (Supply) Act LIV of 1948 Under section 12 of the Act the Board is a body corporate by name having perpetual succession and a common seal Under the administrative rules governing the Corporation, the administration of an electricity system is in charge of the Superintending Engineer and rule 122 states that the Superintending Engineers of the power systems are empowered

*S.A. No 1458 of 1962. 14th October, 1966.

to accept an agreement for low-tension supply of power. In the instant case the Superintending Engineer alone has signed the suit agreement on behalf of the plaintiff Board He is certainly a principal officer of the Corporation, and Order 29, rule 1, Civil Procedure Code, does speak of the principal officer of the Corporation. If the Board could frame a regulation, in the circumstances, the proceeding of the Board, dated 6th July, 1957, can be considered a regulation as contemplated under section 79. May be the regulation is transitory in character, and contemplates detailed regulations in future. It is not shown to be *ultra vires* of the Board The point that the Superintending Engineer was not competent to sign and verify the plaint, therefore, fails.

The objection is to the frame of the cause title which runs, *The Madras State Electricity Board by the Superintending Engineer, Mettur Electricity System.* It has never been contended that the plaintiff was not the Board. Proceedings have gone on till now on the basis that the Electricity Board is the plaintiff not only in substance, but also *de facto* If the point had been taken at the earliest opportunity all that might have been necessary would be to delete part of the description in the cause-title. Obviously as the Superintending Engineer was signing and verifying the plaint, this was brought to the forefront by the description in the cause-title. Very likely the effect of using the preposition "by" which in the context means *through the instrumentality of* was not considered. The cause-title read as if the plaintiff is the Superintending Engineer, suing no doubt on behalf of the Board, while, in fact, what is meant is that the Board is using, the Superintending Engineer signing and verifying the plaint on behalf of the Board. The intention being clear that it was the Board that has been suing, the defect is purely one of form and it cannot be made a ground for setting aside the decree and that in second appeal.

Whether the consumer takes energy or not, by reason of the covenant, the Board has to keep the supply ready at the defendant's end for being tapped by the defendant whenever he wanted. Elaborate machinery is found in the Act and Rules for fixing the tariff. Section 23 (4) of Act IX of 1910 provides for certain factors to be taken into consideration. But the question is whether the provision for the minimum guarantee is just a stipulation by way of penalty or predetermined damages for breach on the part of the consumer or something else. The minimum fixed is only consideration for keeping the energy available to the consumer at his end; it is not a penalty for not consuming a stated quantity of energy. The meaning of the clause was that the minimum rent did not merely cover the actual but that the right to use the current. The customer had to pay for the right to use the current, although he did not in fact use it.

Thus it is seen that there is a statutory basis also for the term in the agreement providing for a minimum annual charge. That apart, there is nothing illegal in the insertion of a term for payment of a minimum charge in the agreement for supply of energy, and it has not been made out that it is an unreasonable levy.

Appeal against the decree of the Subordinate Judge of Salem in Appeal Suit No. 78 of 1962, preferred against the decree of the District Munsif of Dharmapuri in Original Suit No. 221 of 1960.

N. R. Raghavachariar and *Jayalakshmi Srikumar,* for Appellant.

G. Ramanujam, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant, a consumer of electricity under the Madras State Electricity Board, has filed this second appeal, challenging, *inter alia,* the claim for the recovery of the annual minimum amount guaranteed under an agreement for supply of electricity. The agreement was entered into on 2nd February, 1954, by the electricity department of the State of Madras and by and under the agreement the defendants had agreed to take supply of electric energy for a ten horse-power motor in his field bearing S. No. 726 in Naduhalli village, Salem District. The agreement

provided that the defendant was liable to pay to the Government a minimum charge of rupees three hundred and fifty per annum for a period of ten years from 18th July, 1954, that is from the date on which the supply was available to the defendant at his end, whether electric energy was consumed or not. There was provision in the agreement for disconnecting supply after seven days notice for non-payment of bills within thirty days. The defendant failed to pay the current consumption charges for the month of June, 1957, and after due notice to the defendant, the supply was disconnected on 31st August, 1957. The suit has been filed for recovery of arrears to the tune of Rs. 1,150-53 for the period 31st August, 1957, to 17th July, 1959. It may be stated that on 1st July, 1957, the rights of the State Electricity Department vested in the Madras State Electricity Board, the plaintiff in the suit, and the suit has been instituted by the Board for the recovery of the arrears.

Various defences were raised, but only two of them have been persisted in: (*i*) whether the plaint has been properly signed and verified on behalf of the plaintiff Board, and (*ii*) whether the provision for the payment of the sum of rupees three hundred and fifty, the minimum payable under the agreement by the defendant, whether he consumed electricity or not, was not a penalty clause and so unenforceable.

A further point was raised that whereas the agreement was for the supply for a ten horse-power motor, actually the supply was only for a five horse-power motor. Therefore, it was argued that the plaintiff had failed to act in terms of the agreement. This last plea is wholly devoid of substance. P.W. 2, the supervisor, has deposed that while the department was in a position to give supply for ten horse-power motor, the defendant himself represented that he had installed only a five horse-power motor and wanted electricity to be supplied accordingly, though the sanctioned capacity was ten horse-power.

To take-up the first point; the plaint has been signed and verified by the Superintending Engineer, Mettur Electricity System. The plaintiff Board came into existence on the 1st of July, 1957, under the Electricity (Supply) Act LIV of 1948. Under section 12 of the Act the Board is a body corporate by name having perpetual succession and a common seal. The relevant provision applicable in the matter of signing and verifying pleadings is Order 29, rule 1 of the Code of Civil Procedure, which provides that any pleading in suits by or against a Corporation may be signed and verified on behalf of the Corporation by the secretary or by any director or other principal officer of the Corporation, who is able to depose to the facts of the case. The Courts below have elaborately examined the position and pointed out that the Superintending Engineer is a principal officer of the Corporation who could depose to the facts of the case. Under the administrative rules governing the Corporation the administration of an electricity system is in charge of the Superintending Engineer and rule 122 states that the Superintending Engineers of the power systems are empowered to accept an agreement for low-tension supply of power. In the instant case the Superintending Engineer alone has signed that suit agreement on behalf of the plaintiff Board. He is certainly a principal officer of the Corporation, and Order 29, rule 1, Civil Procedure Code, does speak of the principal officer of the Corporation.

The Board further relied on its proceeding, dated 6th July, 1957, which runs thus:

> " The Madras State Electricity Board hereby directs that the powers delegated by the Government of Madras to the Chief Engineer (Electricity) and his subordinates prior to 1st July, 1957 be continued to be vested in them till the necessary regulations in this regard are framed by the Board under section 79 of the Electricity (Supply) Act, 1948.

On the strength of this proceeding, the Board rested upon G.O.Ms. No. 336, Law, dated 10th August, 1956, whereby the Superintending Engineers to Government are authorised to sign and verify plaints and written statements on behalf of the Government. Section 79 of the Electricity (Supply) Act, provides for the Board

making regulations not inconsistent with the Act, and the Rules made thereunder, to provide *inter alia* in regard to the duties of officers and servants of the Board and their salaries, allowances and other conditions of service, and in regard to matters arising out of the Board's functions under the Act for which it is necessary or expedient to make regulations. Learned Counsel for the Board contends that the proceeding, dated 6th July, 1957, should be considered to be regulation, and when so considered, the Superintending Engineer by the earlier Government Order gets authority to sign and verify plaints on behalf of the Board Learned Counsel for the appellant submits that the proceeding could not be deemed to be a regulation as it contemplates the framing of regulations in future Now no procedure is prescribed under the Act and no formality provided as to how a regulation is to be framed. The only proviso under section 79 requires that certain regulation could be made only with the previous approval of the State Government and certain other regulations shall be made with the concurrence of the Central Electricity Authority constituted under the Act. It is not contended that the proceeding, in question, comes under any of the regulations contemplated in the proviso. Section 13 of the Act may be referred to, in this connection. It provides that all orders and decision of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of such member or officer of the Board as may in like manner be authorised in this behalf If the Board could frame a regulation, I do not see why, in the circumstances, the proceeding of the Board, dated 6th July, 1957, cannot be considered a regulation as contemplated under section 79 May be the regulation is transitory in character, and contemplates detailed regulations in future. But there is nothing wrong in having a regulation for the time being tentatively adopting pre-existing rules to avoid any hiatus It is not shown to be *ultra vires* of the Board The point that the Superintending Engineer was not competent to sign and verify the plaint, therefore, fails.

Another point was raised before me, and this for the first time in second appeal. The objection is to the frame of the cause-title, which runs, *The Madras State Electricity Board by the Superintending Engineer, Mettur Electricity System* Learned Counsel for the appellant submitted that the plaintiff on the aforesaid description is the Superintending Engineer of the System, and not the Board The argument runs: admittedly the Superintending Engineer has not been authorised to institute suits in his own name at the most, he can claim authority to sign and verify pleadings on behalf of the Corporation but the suit has been instituted by the Superintending Engineer no doubt on behalf of the Corporation It has, therefore, to fail because he has no authority to institute the suit by himself No ground in this form has been taken even in the memorandum of grounds of appeal to this Court Advantage is obviously sought to be taken of what may be considered to be misdescription It has never been contended that the plaintiff was not the Board Proceedings have gone on title now on the basis that the Electricity Board is the plaintiff not only in substance, but also *de facto* If the point had been taken at the earliest opportunity all that might have been necessary would be to delete part of the description in the cause-title. Obviously as the Superintending Engineer was signing and verifying the plaint, this was brought to the forefront by the description in the cause-title. Very likely the effect of using the preposition by which in the context means *through the instrumentality of* was not considered It makes the cause-title read as if the plaintiff is the Superintending Engineer, suing no doubt on behalf of the Board, while, in fact, what is meant is that the Board is suing, the Superintending Engineer signing and verifying the plaint on behalf of the Board The intention being clear that it was the Board that has been suing, the defect is purely one of form and it cannot be made a ground for setting aside the decree and that in second appeal.

To come to the substantial point the agreement provides that the consumer shall pay to the Government for electric energy supplied at the rates given in the schedule in accordance with the terms of the agreement and that the minimum rates specified should be paid irrespective of whether energy to that extent has been

consumed or not The monthly minimum whether electricity is consumed or not, is fixed at Rs 29-2-8 The argument of learned Counsel is that the agreement must be read as a contract for supply of electric energy at specified rates and that the minimum charge is a penalty for breach of the agreement to consume energy It is, therefore, argued that the plaintiff can claim only compensation for breach under section 73 of the Indian Contract Act, that section 74 of the Contract Act would apply and that the minimum charge fixed is only the maximum compensation that the plaintiff would be entitled to in law the plaintiff cannot claim anything more than reasonable compensation for the breach and he must establish the loss or damage consequential on the non-consumption of electricity by the defendant and claim only that amount.

Reference was made to the decision of the Supreme Court in *Fatehchand* v *Balkrishnadass*[1], for the position that the measure of damages in the case of breach of a stipulation by way of penalty is by section 74 of the Contract Act, reasonable compensation not exceeding the penalty stipulated for. It was submitted that in assessing the damages the Court can, subject to the limit of the penalty stipulated, award only such compensation as it deems reasonable having regard to all the circumstances of the case It is contended that the plaintiff has failed to prove specifically the loss suffered by it in consequence of the breach of the contract committed by the defendant. Learned Counsel would contend that the plaintiff has not made out that by the failure of the defendant to consume energy, energy was left in surplus. This argument, in my view, fails to take note of the true character of the relevant terms. The defendant would read the provision for minimum charge as the equivalent of the price paid for the guaranteed consumption But, as pointed out by P W 3, the special guarantee is the minimum return anticipated on the capital invested by the Board irrespective of whether the consumer consumed energy or not Whether the consumer takes energy or not, by reason of the covenant, the Board has to keep the supply ready at the defendant's end for being tapped by the defendant whenever he wanted It is seen from the record that the scheme of supply was extended solely for supplying energy to the defendant at a total cost of Rs 10,967 07, exclusive of establishment charges A reference to *Mear's Law relating to Electrical Energy in India and Burma*, Sixth Edition, page 97, would show that the minimum charge has been customary and has long been in force It is pointed out that it has a substantial foundation, namely, that every consumer's intallation in volves the licensee in a certain amount of capital expenditure in plant and mains on which he is entitled to a reasonable return

Elaborate machinery is found in the Act and Rules for fixing the tariff Section 23 (4) of Act IX of 1910 provides for certain factors to be taken into consideration. It cannot be, and it was not, contended that the term in the agreement itself is *ultra vires* of the Board The argument has been that the minimum is the quantum of damages fixed in the agreement for not taking the guaranteed consumption, that it is a penal provision and that it is a case merely of breach of contract entitling the Board to claim only reasonable compensation in accordance with the provisions of sections 73 and 74 of the Contract Act The agreement, no doubt, is just a contrace and is binding between the parties like any other contract subject to the provisions of the Electricity Act of 1910, and the Electricity (Supply) Act of 1948 True also, if there is breach by either party, there will be liability for damages. But the question is whether the provision for the minimum guarantee is just a stipulation by way of penalty or predetermined damages for breach on the part of the consumer or something else In my view the minimum fixed is only consideration for keeping the energy available to the consumer at his end, it is not a penalty for not consuming a stated quantity of energy I would view it as a concession shown up to the amount fixed, energy at the specified rates could be consumed free, consumption beyond only has to be paid for In *The Land Elec Supply Corporation* v *Priddis*[2], an installation was put in on the terms that the consumer should have the right to

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1 (1964) 1 M L J (S C) 60 (1964) 1 An W R (S C.) 60 : (1964) 1 S.C R 515 : (1964) 1 S C J 187 A I R 1963 S C. 1405.
2. (1901) 18 T L R. 64-B.

purchase the installation after five years, and during that period of five years the consumer should be liable to pay a minimum rent, whether the current was *de facto* used or not. The consumer had, until purchase, to pay quarterly to the supply company for the use of the installation 3/4 per Board of Trade Unit for every unit for electrical energy supplied to the premises and the minimum payment in any year had to be 1s. for each eight candle power lamp or its equivalent installed. In giving judgment the learned Chief Justice observed:

> " The minimum rent had no reference to the amount of current used, and it was therefore clear that the mere fact that the defendant had not taken any current or a small current did not affect the case.

Channell, J., concurring stated:

> " The meaning of the clause was that the minimum rent did not merely cover the actual but the right to use the current. The customer had to pay for the right to use the current, although he did not in fact use it."

I respectfully adopt the approach of Channell, J , to the matter. Learned Counsel for the appellant contended that the case was one where the consumer had agreed to purchase the installation ultimately The feature of the agreement in that case does not, in my view, affect the *ratio* of the decision.

In *Mrs. Saila Bala Roy* v. *Chairman, Darjeeling Municipality*[1], Mitter, J., said:

> " A minimum charge is not really a charge which has for its basis the consumption of electric energy. It is really based on the principle that every consumer's installation involved the licence in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed, in the shape of payments for the energy consumed. When no energy is consumed by the consumer or a very small amount is consumed in a long period, he is allowed to charge minimum charges by his licence, but these minimum charges are really interest on his capital outlay incurred for the particular consumer."

The legality of minimum charge is discussed *in extenso* in *Watkins Mayor & Company* v. *Jullundar Electric Supply Company*.[2] The learned Judges observe:

> " The whole scheme of the Act seems to show that the provision made in any contract for a minimum charge is really to provide for a fair return on the outlay of the licensee, and it is for this reason that the law allows a contract of this kind to be entered into... .. .."

Learned Counsel for the appellant contends that the decision in *Watkins Mayor & Company* v. *Jullundar Electric Supply Company*[2], is based upon clause XI-A of the Schedule to the Electricity Act of 1910 and that this clause which was inserted in 1922 has been omitted by Act XXXII of 1959. Therefore, it is argued that the decision cannot be of any help now. In my view the decision does not rest wholly on the now deleted clause XI-A of the Schedule. The provisions in the Schedule to the Act, it is provided in the Act are deemed to be incorporated with and to form part of every licence granted under Part II of the Act (IX of 1910) save in so far as they are added to varied or excepted by the licence. Clause XI-A of the Schedule ran thus :

> " A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his licence, and such minimum charge shall be payable notwithstanding that no energy thas been used by the consumer during the period for which such minimum charge is made."

It no doubt expressly authorised the levy of minimum charge But to start with, there is no provision in the relevant Acts prohibiting or precluding the insertion of a clause for payment of minimum charge in any contract between a licensee or the Board and the consumer. Only the term has to be in conformity with the provisions of the Act and the Rules made thereunder. If a statutory basis for the

1. A.I.R. 1936 Cal. 265, 266. 2. A I.R. 1955 Punj. 133, 136.

term is required, section 22 of Act IX of 1910 itself provides it. Section 22 makes it obligatory on the licensee to supply energy to every person in the area applying, subject to the following proviso.

> " Provided that no person shall be entitled to demand, to continue to receive from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for these premises, the sum payable to be determined in case of difference or dispute by arbitration."

The provisions contained in the Schedule to Act IX of 1910, are only deemed to be incorporated with and to form part of every licence granted under that part, save in so far as they are expressly added to, varied or excepted by the licensee. When the section itself enables the licensee to levy a minimum charge, clause XI-A inserted in the Schedule is only a provision *ex abundanti cautela*, and its deletion cannot take away the right of the licensee to levy a minimum charge granted under the section. For the Board reliance is placed also on section 23 (3) of Act IX of 1910, which provides that in the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer :—

(*a*) by the actual amount of energy so supplied for

(*b*) by the electrical quantity contained in the supply, or

(*c*) by such other method as may be approved by the State Government.

Learned Counsel for the Board relies on clause (*c*) above set out and contends that in the present instance the agreement was entered into by the State Government itself originally. It is pointed out that the approval of the State Government to the method of charging found in the agreement, the subject of consideration in this case is manifest. It is stated that the rights of the State Government have since devolved on the Board and that, therefore, there is sufficient authority to levy the minimum charge claimed This is an additional argument in support of the claim on the particular facts of the case.

Learned Counsel for the appellant argues that in view of section 26 of the Electricity (Supply) Act (LIV of 1948), the Board cannot rely upon sections 22 and 23 of Act IX of 1910. Section 26 of Act LIV of 1948 runs thus :

> " Subject to the provisions of this Act, the Board shall in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910 (IX of 1910), and this Act shall be deemed to be the licence of the Board for the purposes of that Act:
>
> Provided that nothing in sections 3 to 11, sub-section (2) and (3) of section 21 and section 22, sub-section (2) of section 22-A and sections 23 and 27 of that Act or in clauses I to V, clause VII and clauses IX or XII of the Schedule to that Act relating to the duties and obligations of a licensee shall apply to the Board."

While learned Counsel for the Board contends that only the provisions of the aforesaid sections relating to the duties and obligations of a licensee are made not applicable to the Board by the proviso, the appellant's Counsel would contend that as every right in the case of statutory body may also be looked upon as a duty or obligation such rights also cannot be relied upon. There is a limitation of the right conferred when the right is specified in a statute. In my view, this is not the way of looking at the particular provision of section 26. At any rate a right conferred on a licensee to levy a minimum annual sum cannot be considered to be a duty or obligation of the licensee. In fact, under section 22 of the Act, the duty or obligation to pay minimum annual sum is placed in the consumer. Now section 70 of Act LIV of 1948 also provides by sub-section (2) that·

1. A.I R. 1955 Punj. 133, 136.

" Save as otherwise provided in this Act, the provisions of this Act, shall be in addition to, and not in derogation of, the Indian Electricity Act, 1910 "

Section 49 of Act LIV of 1948, has also bearing on the subject now under consideration It runs

"Subject to the provisions of this Act and of any regulations made in this behalf the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board may from time to time fix having regard to the nature and geographical position of the supply and the purposes for which it is required

Provided that in fixing any such terms and conditions the Board shall not show undue preference to any person "

Thus it is seen that there is a statutory basis also for the term in the agreement providing for a minimum annual charge That apart as discussed earlier there is nothing illegal in the insertion of a term for payment of a minimum charge in the agreement for supply of energy, and it has not been made out that it is an unreasonable levy. I have held that it is not a penalty clause

In the circumstances, the second appeal fails and is dismissed with costs

Leave granted.

V M.K ——— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE M NATESAN.

Kalyani Ammal . *Appellant**

v.

Ezhumalai Nattar and another . *Respondents.*

Transfer of Property Act (IV of 1882), section 55, clause (2)—Breach of the covenant of title and quiet enjoyment by the deceased vendor (life tenant)—Remainderman and heir of the vendor filing suit for possession—Compromise and consent decree—Remainderman obtaining possession, but the vendee receiving only the value of improvements made by her—Vendee claiming damages for breach of covenant of title and quiet enjoyment—Earlier settlement, if precludes the claim for damages—Measure of damages—Purchaser compelled to give up possession—Market value at the time of dispossession.

The conveyance in question by the deceased in favour of the plaintiff contains the usual covenant of title and quiet enjoyment. It is recited in the sale deed that the property conveyed is the sale acquisition of the vendor and that the consideration of Rs. 2,500 settled having been received, the vendee (the plaintiff) and her heirs may thenceforth hold and enjoy the property with absolute rights as under an out and out sale with rights of alienation by gift, sale or otherwise. It has turned out since, that she had no authority to grant a conveyance which would enure beyond her life The third defendant, as the remainderman filed a suit for possession of the suit property impleading the plaintiff as the sole defendant in the suit This suit ended in a decree by consent It was provided by the decree that the third defendant should, before taking possession of the property personally, and charged on the suit property, pay the plaintiff certain sum of money being the value of improvements made by the plaintiff Within few days of losing possession of the suit property, the plaintiff filed the (present) suit claiming damages for breach of covenant of title and quiet enjoyment against the defendants in the suit as heirs and legal representatives of the vendor (the life tenant).

Has the earlier settlement (compromise) precluded the plaintiff from agitating her claim in damages for breach of covenant of title and quiet enjoyment?

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* S A. No. 1445 of 1962 2nd February, 1967.

Held that It is a coincidence that the remainderman is also a legal representative of the life tenant who had attempted to convey absolute interest in property. The present suit is laid against the third defendant not as a remainderman who has taken possession of the suit property but as heir of the vendor (life tenant). The cause of action for the present suit is the dispossession There is nothing in the compromise even impliedly suggesting that the claim for damages for breach of covenants under the sale deed was also the subject of settlement. Thus the plaintiff had not specifically given up her rights to claim damages in respect of her eventual dispossession

Held also that, the vendor, certainly cannot escape from responsibility for the obligation she has guaranteed when it is ultimately found that her title was not as extensive as she purported it to be. She may be dead but her estate could be made to answer for the breach The covenant for quiet enjoyment in its nature can survive the covenantor. It is not simply a personal covenant of the vendor to come to an end with life with which the purported transfer came to an end. The covenant neither expressly nor impliedly is limited in its duration to the lifetime of the vendor.

It is well settled that if the purchaser is compelled to give up possession by reason of the extinction of the settlor's title, the normal measure of damages follows the general principles of law. If the purchaser is evicted the measure of damages is the market value of the land at the time of eviction The plaintiff who is entitled only to the value of the property can get only its real value, namely, the diminished value of the property by reason of the subsisting encumbrance and not the value of the property free of encumbrances

Appeal against the Decree of the Second Additional Sub-Court, Cuddalore, in A.S. No. 169 of 1960 preferred against the decree of the District Munsif, Chidambaram in O S. No 3 of 1959.

M. Srinivasan for *R. Gopalaswami Ayyangar*, for Appellant.

V. Krishnan, for Respondents

The Court delivered the following

JUDGMENT —The plaintiff, the decision in whose favour in the Court of first instance has been reversed on appeal raises an interesting question of law and I shall first set out the facts not in dispute The suit is one for recovery of damages on breach of covenant of title and quiet enjoyment in relation to a purchase of certain immovable property by the plaintiff from one Thayanayaki Ammal The property had originally belonged to a certain Kuppa Nattar, the maternal grandfather of the contesting respondent, the third defendant in the case This Kuppa Nattar had two daughters, the said Thayanayaki Ammal and Chinnakolandai, mother of the third defendant On 6th May, 1927, he settled the property of his aforesaid daugh ers for their life, the present third defendant to take the property absolutely after their lifetime In 1930 Kuppa Nattar alleging dissatisfaction with his daughters' treatment of himself and his wife, purported to revoke the settlement deed but later conveyed the property in favour of his daughter Thayanayaki for a consideration of Rs. 400. Thayanayaki in her turn sold the property to the plaintiff under the registered sale deed dated 2nd March, 1947 for a consideration of Rs. 2,500 Exhibit A-1 is the registration copy of the deed On Chinnakolandai's death the present third defendant instituted the suit O S No 93 of 1951 on the file of the District Munsif's Court, Chidambaram, impugning the validity of the revocation deed and the subsequent transfers and claiming possession of the property The present plaintiff was the first defendant in that suit. It was decided therein that the revocation was invalid and did not affect the third defendant's vested rights under the settlement deed But it was held that the 3rd defendant could claim possession of the suit property only after the lifetime of Thayanayaki, the plaintiff's vendor. The present plaintiff had then contended that certain improvement had been effected by her and this was evaluated at Rs. 800. Thayanayaki Ammal died on 4th May,

1957 and thereupon the present third defendant as the remainderman filed the suit O.S. No 158 of 1957 on the file of the Court of the District Munsif, Chidambaram, for possession of the suit property impleading the present plaintiff as the sole defendant in the suit. This suit ended in a decree by consent on 19th June, 1958. It was provided by the decree that the third defendant should before taking possesrsion of the property personally, and charged on the suit property pay the present plaintiff a sum of Rs. 1,350 inclusive of the sum of Rs. 800 found as the value of improvements in O S. No. 93 of 1951. Till payment of this amount the plaintiff could enjoy the suit properties but should vacate and deliver vacant possession on receipt of the said sum of Rs. 1,350. There is no dispute that the 3rd defendant deposited the amount of Rs. 1,350 in Court as provided for in the compromise and that he took possession of the suit property from the plaintiff on 12th December, 1958 Within ten days of losing possession of the suit property on 22nd December, 1958, the plaintiff filed the suit out of which the present second appeal arises claiming damages for breach of covenant of title and quiet enjoyment against the defendants in the suit as heirs and legal representatives of Thayanayaki Ammal Besides the third defendant two other persons were impleaded, defendants 1 and 2 as person in possession of the property of Thayanayaki Ammal. Several defences were raised against the claim, *inter alia*, *res judicata*, estoppel and limitation and there was also a counter-claim. The property was subject to a mortgage dated 11th September, 1947 in favour of Thayanayaki Ammal herself for a sum of Rs. 1,000. The third defendant counter claimed for the amounts due under this mortgage with interest till 12th December, 1958, paying the necessary Court-fee. The trial Court dismissed the suit as regards defendants 1 and 2 as they were not heirs of Thayanayaki Ammal and were not in possession of any of her assets. The third defendant claimed himself to be heir to the deceased. At the trial, it came out that the third defendant had a sister Valambal who also would be an heir. She was subsequently impleaded as a respondent (4th defendant) in the appellate Court and she has remained *ex parte*. The trial Court assessed the market value of the property which the plaintiff purchased and lost at Rs. 4,000 on the date the plaintiff lost possession As the plaintiff had received a sum of Rs. 1,350 as and for the value of improvements to the property, the trial Court passed a decree for damages in favour of the plaintiff for a sum of Rs 2,650 against the estate of Thayanayaki Ammal in the hands of the third defendant. The trial Court rejected the counter-claim holding that no counter-claim was tenable on the facts of the case pointing out that the personal remedy on the mortgage had become barred. On appeal by the third defendant, the learned Subordinate Judge has construed the earlier compromise decree in O S. No. 158 of 1957 between the plaintiff and the third defendant, Exhibit A-2, as in full settlement of all claims of the plaintiff. In the circumstances, while finding against the pleas of *res judicata* estoppel by judgment and limitation reasserted by the third defendant, plaintiff was held estopped by conduct from claiming any damages, the plaintiff having taken Rs. 1,350 under the settlement in O.S. No. 158 of 1957.

On the contentions of Counsel before me, three questions arise for consideration in the appeal (1) the question whether the earlier settlement in O S. No. 158 of 1957 precluded the plaintiff from agitating her claim in damages for breach of covenant of title and quiet enjoyment, (2) the contention that as the plaintiff lost her right to possession only by the death of her covenantor, the covenant of quite enjoyment also came to an end ; and (3) the question as to the quantum of damages which the plaintiff is entitled to, the property having been subject to an encumbrance at the time of the dispossession in favour of the covenantor herself. I may at once state that there is no substance in the first contention The suit O S. No 158 of 1957 was a suit by the present third defendant as the remainderman and not as representing the estate of the deceased. True, it is recited in the memorandum of compromise that over and above the sum of Rs. 800 provided for as the value of the improvements in O S. No 93 of 1951, the plaintiff therein, the present third defendant, was to pay the present plaintiff, the defendant therein, a further sum of Rs. 330 in respect of the claim over the suit property then put forward by her. The lower appellate Court

has placed considerable reliance for its construction of the compromise on a term therein that excepting the right to the sum of Rs. 1,350 the present plaintiff shall not have any other over the suit property. There is absolutely nothing in the compromise even impliedly suggesting that the claim for damages for breach of covenants under the sale deed was also subject of the settlement. Certainly the claim for damages for breach of covenant and quiet enjoyment is not a claim over the property the subject of that suit.

On the death of the vendor, her title over the property had become extinguished and equally all rights and interests of the vendee over the property. The term in question, in the compromise is only a specific re-affirmation of this position, the only possible claim relating to improvements having been settled. In fact, it is this term negativing all interests and rights over the property that gives the present plaintiff her cause of action to their damages. It is a coincidence that the remainderman is also a legal representative of the life tenant who had attempted to convey absolute interest in the property. The present suit is laid against the third defendant not as a remainderman who has taken possession of the suit property but as heir of Thayanayaki Ammal who has inherited her other properties. The learned Subordinate Judge himself remarks that the plaintiff had not specifically given up her rights to claim damages in respect of her eventual dispossession. It must be noted that the cause of action for the present suit is the dispossession and the dispossession was on 12th December, 1958. Now if notwithstanding the compromise decree, the third defendant had not deposited the sum of Rs. 1,350 and not taken possession, the present plaintiff would have had no cause of action on the basis of the covenant of quiet enjoyment. It is the loss of the properties and all rights therein that has given her the cause of action to maintain the suit against the heir of her vendor. No doubt it would have been open to the third defendant in his suit for possession to have settled this claim also, in the particular circumstances, as he happened to be an heir of the deceased. But that has not been the subject of the compromise. Admittedly, the claim for damages was not mooted in those proceedings. Nor any case of representation to base an estoppel thereon has been made out. There is no evidence of any representation by the present plaintiff that on payment of Rs. 1,350 she would make no claim against the estate of Thayanayaki Ammal for damages.

Now to take up the second point, the conveyance in question by the deceased in favour of the plaintiff contains the usual covenant of title and quiet enjoyment. It is recited in the sale deed that the property conveyed is the sale acquisition of the vendor and that the consideration of Rs 2,500 settled having received, the vendee and her heirs may thenceforth hold and enjoy the property with absolute rights as under an out and out sale with rights of alienation by gift, sale or otherwise. The vendor gives an assurance against encumbrance and a covenant holding herself responsible for losses that may be suffered by reason of any encumbrance over the property. It has turned out since, that she had no authority to grant a conveyance which could enure beyond her life. By the conveyance she has guaranteed quiet enjoyment to the vendee and her heirs from generation to generation giving absolute rights purporting to convey as full owner. Certainly she cannot escape from responsibility for the obligation she has guaranteed when it is ultimately found that her title was not as extensive as she purported it to be. She may be dead but her estate could be made to answer for the breach. The covenant for quiet enjoyment in its nature can survive the covenantor, it is not a simple personal covenant of the vendor to come to an end with life with which the purported transfer came to an end. The covenant neither expressly nor impliedly is limited in its duration to the lifetime of the vendor and as observed in *Gulabchand* v *Surayi Rao* [1], " it would indeed be a startling result of the incident of the covenant if it was to be extinguished precisely at the moment when the necessity for the protection afforded by it arises ".

The vendor in that case who prior to the impugned alienation had been a ward under the Bombay Court of Ward Act, was not competent to dispose of property

1. A I R. 1950 Bom. 401, 406.

beyond his lifetime without the previous sanction of the Collector By the sale deed in question there, he purported to convey absolute interest in two houses to the vendees. After the death of the vendor his son filed a suit and recovered possession of the houses on the ground that the sale was void beyond the lifetime of the vendor. The suit out of which the appeal in question came up before their Lordships of the Bombay High Court was filed against the son of the vendor as the legal representative of the vendor claiming damages for breach of the covenant of title and quiet enjoyment. The plaintiff relied upon the covenant for title and quiet enjoyment arising by obligation of law under section 55, clause (2) of the Transfer of Property Act as well as by the express words in the sale deed, as in the instant case. It is in the context of this claim that Shah, J , who delivered the judgment of the Bench made the observation above referred to. This case comes close enough to the instant case on hand.

Illustrative of the liability on the covenant in such circumsances, reference may be made to *Williams* v. *Burrel*[1]. There one George, devisee for life with leasing power, by an indenture of lease granted a demise to one Williams for 99 years if three persons therein named should so long live, the indenture assuring the demised premises for the term to the lessee, his executors, administrators and assigns. This lease having upon the death of the George been held to be void as against the remainderman by the judgment of the Court of law, on the ground that it was not made in due conformity with the leasing power, it was held that the clause in question operated as an express covenant for quiet enjoyment during the whole term granted by the lease and consequently the Williams or his assigns or executors etc. right to recover against the executors or George the value of the term, the costs of defending the action of ejectment brought by the remainderman, and also the sum recovered by him for mesne profits Tindal, C J , stated :

> " ......both upon principle and authority, we think this is an express covenant for quiet enjoyment, which extend to the terms purported to be granted and consequently that the defendants are liable thereon are executors of the covenantor."

I may also refer to *Lock* v *Furze* [2]. The facts as set out in the headnote are, *A* was in a possession of premises under a lease from *B*, which would expire on the 4th December, 1864 In February, 1860, *A* in consideration of a premium of £400 obtained from *B*, a further lease of the same premises for 21 years and 21 days, to commence from the expiration of the former lease On the death of *B* in 1863, it was found that *B* was only tenant for life, with power to grant leases in possession and not in reversion, and consequently that the lease so granted by him to *A* in February 1860 was void *A* thereupon obtained from the reversioners a fresh lease for seven years at a considerable increase of rent and sued *C* (*B*'s executor) upon the covenant for quiet enjoyment obtained in the void lease. The plaintiff who got judgment was held entitled to recover besides the £ 400 premium which he had paid to *B*, the costs of preparing the void lease, and the value of what he had lost by *B*'s breach of contract, substantially the difference between the value of the term professed to be granted to him by the lease of November, 1850 and that of his 7 years term which he obtained from the reversioner. In the course of his judgment Channell, C J., observed :

> " The testator expressly bargained for that which he could not perform; and therefore I think the proper principle upon which the damages should be assessed is, a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him."

Looking at the matter from another angle in the present case the estate of the deceased has had the benefit of the bargain by which the deceased had assured quiet enjoyment absolutely and for ever to the vendee, and received consideration on such assurance. If by her death the position should be lost, I do not see why her estate

1. (1845) 1 Com. Bench Rep. H. 8 Vict. 402 at 433.
2. (1865-1866) Vol. 1, L.R. Com. Pleas 441.

which had gained under the covenant should not be made to compensate in damages for breach of the covenants. The representatives of the estate will be bound by the covenant of the deceased. There is nothing in the nature or character of the covenant that would terminate it with the death of the covenantor *vis-a-vis* the covenantor's representatives and the covenantee

To take up the third question, damages, it is well settled that if the purchaser is compelled to give up possession by reason of the extinction of the settlor's title, the normal measure of damages follows the general principles of law, the purchaser is evicted the measure of damages is the market value of the land at the time of eviction as pointed in Mayne and Mecgregor on Damages, 12th Edition, page 463 :

> " The market value of the land is to be taken at the time neither of contract nor ofconveyance but of eviction, and that therefore any increse in its value, whether due to ordinary market changes or to improvements made on the land by the purchaser will fall within the assessment figure ".

In Williams on Vendor and Purchaser, 4th Edition, Volume II, the principle is thus stated at page 1089 :

> " The measure of damages for breach of covenant for quiet enjoyment (which, as we have seen is not broken until some actual disturbance has taken place) is what the covenantee has lost in consequence of the breach of the covenant ; that is to say, in case of an entire eviction, the value at the date of the breach of the property so taken away from him."

At page 1090 it is stated :

> " The actual value of the land as it existed at the date of the breach of covenant would include the value of any building or similar improvements which the purchaser has erected or made ".

In the present case both the Courts below have concurrently assessed the market value of the property at Rs. 4,000. The plaintiff had already received a sum of Rs. 1,350 as the value of the improvements she had given up and normally she would be entitled to the balance, namely, a sum of Rs. 2,650 as damages. But the property on the date of dispossession was subject to an encumbrance in favour of the vendor herself. The 3rd defendant had put in a counter claim for Rs. 1,843-75 made up of the principal and interest due on the mortgage less a sum of Rs. 100 stated to have been paid for the mortgage. The personal remedy on the mortgage had become barred long ago but the mortgage was subsisting. The trial Court while granting the decree for damages rejected the counter claim in its entirety as not maintainable either independently or as a set off, legal or equitable. The appellate Court while of the view that there could be a set off, has not gone into the claim as it was dismissing the suit. The learned Subordinate Judge felt that, if necessary, the counter claim would have to be remanded for fresh disposal. I do not think that any remand is necessary in this case. The plaintiff is entitled only for the value of the property on the date of the dispossession and it is manifest that the monetary loss which the plaintiff has sustained is the value of the equity of redemption The mortgage was subsisting at the time of the dispossession. It must be borne in mind that if the mortgagor was personally liable, if the property had been sold free of encumbrances on the date of dispossession, the mortgagor could have got only the market price less the amount due on the mortgage. To the extent there was a subsisting encumbrance on the property, the value of the property stood diminished. The plaintiff could get only the diminished value. In the circumstoces, it is unnecessary to examine the question whether there can be a set-off legal or equitable or the counter claim is tenable. The plaintiff who is entitled only to the value of the property can get only its real value namely the diminished value of the property by reason of the subsisting encumbrance and not the value of the property free of encumbrances.

In this view before the case could be finally disposed of, it is necessary to ascertain the amount actually due on the mortgage as on 12th December, 1958, the date of

dispossession A finding in that regard is therefore necessary and the learned Subordinate Judge, Cuddalore, will submit a finding, on the question whether any amount and if so what amount was due and outstanding on the mortgage dated 11th September, 1947 executed by the plaintiff in favour of the deceased Thayanayaki Ammal on 12th December, 1958 The parties may be permitted to adduce evidence on the question Time for submission of findings eight weeks from the receipt of records Objections, if any, ten days

* * * * *

(On receipt of the findings, the Court delivered the following Judgment)

The learned Subordinate Judge has submitted his finding that a sum of Rs. 1,743-75 was due on the mortgage of the property as on 12th December, 1958, the date of plaintiff's dispossession It follows that the loss that the plaintiff has suffered by the dispossession is the value of the property less the amount due on the mortgage Giving credit for the other amounts already paid and deducting the value of the encumbrance, the plaintiff will be entitled to, as damages, the sum of Rs 906-25.

There will be a decree for the said amount from the estate of the deceased Thayanayaki Ammal in the hands of the third defendant with interest thereon at 5½ per cent. per annum, from the date of the plaint till date of realisation Having regard to the circumstances of the case, the plaintiff will be entitled to proportionate costs on the amount decreed, in all the three Courts The second appeal is allowed accordingly No leave

V. M. K. — *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE P.S KAILASAM.

S.K. Natesan Pillai . *Appellant**

v

Rathnam Pillai and another *Respondents.*

Limitation Act (IX of 1908), Articles 73, 74, 75, 80 and 132—Interpretation—Effect of promissory note and the varthamanam—Postponement of right to sue—Article 73 inapplicable—No Article providing for a promissory note accompanied by writing postponing the right to sue—Article 80 becomes applicable—'Becomes due' under Article 132 and 'becomes payable' in Article 80—Same consideration applies to these expressions for purpose of limitation

The promissory note was executed on 3rd September, 1947, in faour of the plaintiff's assignor for a sum of Rs 2,400 The interest provided was at 12 per cent Along with the promissory note, a varthamanam letter was executed on the same day The amount of Rs 2,400 was to be paid in monthly instalments of Rs 300 each, the first instalment being payable on 2nd October, 1947. The varthamanam letter also provided that in case of default by the defendant of payment of any of the instalments the entire principal and interest would become payable on the date of default According to the plaintiff, the defendants paid two intalments on 2nd October, 1947 and 2nd November, 1947 and defaulted to pay the instalment on 2nd December, 1947 According to him the endorsement of payment of Rs 5 on 2nd December, 1950, was within time According to the defendants, since they had paid no instalments, the period of limitation started when the first instalment was not paid on 2nd October, 1947, and therefore the endorsement of payment of Rs 5 by the defendants on 2nd December, 1950, was barred by time The suit was filed in 1955. Is the suit barred by time?

* S.A. No. 725 of 1963. 28th January, 1966

Held that, when a promissory note is executed along with a varthamanam letter which regulates payment, the assignee will be entitled to take advantage of the stipulations in the varthamanam letter

The effect of reading the promissory note and the varthamanam letter in the instant case, is that the right to sue in postponed If the promissory note is payable on demand and not accompanied by any writing postponing the right to sue the article applicable is Article 73. When the promissory note is accompanied, as in the present case, by writing postponing the right to sue, Article 73 is not applicable As there is no article providing for a promissory note accompanied by writing postponing the right to sue, Article 80 will have to be held applicable The period of limitation available under Article 80 is three years from the date when the promissory note "becomes payable", whereas under Article 75 the period is from the date when default is made, unless the payee waives the benefit of the provision, So far as Article 132 is concerned, it is clear that the period of limitation starts from the date originally fixed for payment of the principal and not from the date of default. The clause regarding forfeiture is provided for the benfit of the payee and an option given to him to enforce the security in default or to stand by the terms of the document without enforcing the default clause In the absence of very clear words the principle of law that no one is obliged to take advantage of forfeiture cannot be ignored, and the payee cannot be compelled to take advantage of the forfeiture clause so as to make limitation run against him For the purpose of limitation the same consideration is applied to the words "becomes due" under Article 132 and the words "becomes payable" under Article 80 Though the wording in Article 80 is slightly different, the rule laid down regarding Article 132 is equally applicable to Article 80 The suit has therefore to be held within time.

Appeal against the decree of the District Court of Tiruchirapalli in A S. No. 507 of 1960 preferred against the decree of the Sub-Court of Tiruchirapalli in O.S. No 48 of 1955

S. K Ahmed Meeran, for Appellant

A V Narayanaswami Ayyar, for Respondents.

The Court delivered the following

JUDGMENT —The question that arises in this second appeal is whether the suit filed by the plaintiff is barred by time The promissory note on which the suit was filed is Exhibit A-1, dated 3rd September, 1947, executed by the defendants in favour of the Tiruchirapalli Merchants' Chit and Investment Co, Ltd, for Rs 2,400. The promissory note was executed as a security for the amount received by the defendants in chit auction held by the said company The defendants were the successful bidders in one auction, and on receipt of the amount they executed a varthamanam Exhibit A-2, along with the promissory note, Exhibit A-1, on the same date. According to the varthamanam, the sum of Rs 2,400 was to be paid in eight monthly instalments of Rs 300 each, the first instalment being payable on 2nd October, 1946 An endorsement of payment of Rs 5 towards principal and interest was made by both the defendants on 2nd December, 1950, on the promissory note, Exhibit A-1. The promissory note was assigned on 20th April, 1951, by the Tiruchirapalli Merchants' Chit and Investment Co, Ltd, in favour of the plaintiff The present suit was filed on 1st December, 1953 According to the plaintiff, by the varthamanam the defendants agreed to pay the amount mentioned in the promissory note in monthly instalments commencing from 2nd October, 1947 and paid two instalments on 2nd October, 1947 and 2nd November, 1947, and defaulted to pay the instalment due on 2nd December, 1947 As the varthamanam, Exhibit A-2, contained a clause that in default of payment of any of the instalments due, the

entire principal and interest became payable on the date of default, the plaintiff contended that the period of limitation started running form 2nd December, 1947, and the endorsement of payment of Rs. 5 on 2nd December, 1950 was within time The defendants, though originally contended that all instalments had been paid, subsequently denied that they paid the two instalments on 2nd October, 1947 and 2nd November, 1947. According to them, the period of limitation started when the first instalment was not paid on 2nd October, 1947, and therefore the endorsement of payment of Rs. 5 by the defendants on 2nd December, 1950 was barred by time.

The suit was originally filed in the Court of the Subordinate Judge, Tiruchirapalli in 1955 The Sub-Court decreed the suit. The 2nd defendant preferred an appeal and the District Court allowed the appeal so far as the 2nd defendant was concerned and remanded the suit for trial regarding certain issues. The 2nd defendant preferred an appeal and the High Court allowed the appeal in part confirming the order of remand by the District Court only regarding the question of limitation. After remand the 2nd defendant filed an additional written statement contending that the suit was barred by limitation. No additional evidence was adduced after remand. The trial Court held that the suit was within time and decreed the suit. On appeal by the 2nd defendant the learned District Judge confirmed the decree and dismissed the appeal. The aggrieved 2nd defendant has preferred this second a appeal.

The promissory note Exhibit A-1 was executed on 3rd September, 1947 in favour of the plaintiff's assignor, Tiruchirapalli Merchants' Chit and Investment Co., Ltd., for a sum of Rs. 2,400. The interest provided was at 12 per cent. Along with the promissory note Exhibit A-1, the varthamanam letter Exhibit A-2 was executed on the same day. It is now admitted that the promissory note and the varthamanam letter were executed in order to secure repayment by the defendants of the auction chit, which was knocked in their favour. The amount of Rs. 2,400 was to be paid in monthly instalments of Rs 300 each, the first instalment being payable on 2nd October, 1947. The varthamanam letter also provided that in case of default by the defendant of payment of any of the instalments the entire principal and interest would become payable on the date of default. It was contended on behalf of the 2nd defendant—appellant by Mr. Ahmed Meeran, learned Counsel, that the burden is on the plaintiff to plead and prove that the suit is within time and that the plaintiff has failed in establishing that the suit is within time. He contended that the plaintiff has to prove that there was no default of payment of the instalments on 2nd October 1947, and 2nd November, 1947, and that the plaintiff apart from pleading has not substantiated his plea that there was payment of the monthly instalment on 2nd October, 1947 and 2nd November, 1957. He also submitted that an assignee of the promissory note cannot take advantage of the benefits under Exhibit A-2 the varthamanam letter.

Both the Courts have now found that the promissory note, Exhibit A-1, and the varthamanam letter Exhibit A-2, were executed as part of the same transaction for securing payment of the amount, which was drawn by the defendants in the chit fund. The payment is therefore, according to the terms of Exhibit A-2, by monthly instalments with a stipulation that in the event of default in payment of any of the instalments the entire amount became due. Mr. Ahmed Meeran relied on the decisions in *Periakaruppa Chetti* v. *Mottaya Mudali*[1], *Viraraghavalu Naidu* v. *Rajalinga*[2], *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[3], wherein it has been held that an assignee of the promissory note could only have a relief on the basis of the promissory note and that the assignee is not entitled to place himself in the position of the payee of the promissory note and claim relief against other persons also. It is true that the assignee of the promissory note does not always get all the rights of the payee of the

1. (1935) 69 M.L.J. 30.
2. (1939) 2 M.L.J. 531.
3. (1939) 1 M.L.J 378: I.L.R (1938 Mad. 568.

promissory note The payee can proceed against not only the executant of the promissory note but also the members of the joint family which the executant represents but the assignee will not be in a position to do so. But the cases cited do not lend any support to the proposition that when a promissory note is executed along with a varthamanam letter which regulates payment, the assignee will not be bound by or take advantage of the stipulations in the varthamanam letter. No authority for the proposition was cited, and therefore, this contention of the learned Counsel for the appellant fails

The main question that has to be determined is as to which article of the Limitation Act is applicable to the facts of this case. The Articles to be considered in this connection are Articles 73, 74, 75, 80 and 132 Article 74 provides that the period of limitation for a promissory note or a bond payable by instalments shall be three years from the expiration of the first term of payment as to the part then payable, and for the other parts from the expiration of the respective terms of payment. Under section 75 the period of limitation on a promissory note or a bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due, in three years from the date when the default is made, unless where the payee or obligee waives the benefit of the provision, in which case the period to be computed is when fresh default is made, in respect of which there is no such waiver. Article 73 provides a period of three years from the date of the promissory note, when the promissory note is payable on demand and not accompanied by any writing restraining or postponing the right to sue The effect of reading the promissory note, Exhibit A-1, and the varthamanam letter Exhibit A-2, is that the right to sue is postponed If the promissory note is payable on demand and not accompanied by any writing postponing the right to sue the article applicable is Article 73. When the promissory note is accompanied, as in the present case, by writing postponing the right to sue, Article 73 is not applicable. It has to be considered whether Article 75 or Article 80 is applicable Article 80 is a residuary article, and if Article 75 is not applicable, Article 80 would be applicable. Mr. Ahmed Meeran attempted to bring the case under Article 75. Mr. Narayanaswami Aiyar, learned Counsel for the respondent was equally anxious to steer clear of Article 75. It is the contention of Mr. Narayanaswami Iyer that Article 75, is applicable only to a promissory note, which itself provides for payment in instalments, and is not applicable to cases when the promissory note is accompanied by varthamanam letter, which stipulates payment in instalments. Article 73 is applicable to a promissory note not accompanied by any writing postponing the right to sue, as no article is specially provied for It is the contention of the learned Counsel for the respondent that the residuary Article *i.e.*, Article 80, is applicable, whereas it was contended by Mr. Ahmed Meran that for attracting Article 75 it is not necessary that payment by instalments should be provided for in the promissory note itself. Though Article 75, does not specifically provide that the payment by instalments should be provided in the promissory note itself, reading Articles 73, 75 and 80 together I am inclined to accept the contention of Mr. Narayanaswami Aiyar, learned Counsel for the respondent, that Article 80 is alone applicable. When Article 73 is made applicable to promissory notes payable on demand not accompanied by any writing postponing the right to sue, there is no article as such which provides for a promissory note accompanied by writing postponing the right to sue. On a reading of Article 73, it cannot be said that the article is applicable to promissory notes accompanied by writing postponing the right to sue, as it mentions only the promissory notes payable by instalments In the cases cited by learned Counsel on both sides, Article 75 is made applicable only when the promissory note itself stipulates payment by instalments. As there is no article providing for a promissory note accompanied by writing postponing the right to sue, Article 80 will have to be held applicable.

The period of limitation available under Article 80 is three years from the date when the promissory note " becomes payable " whereas under Article 75 the period is from the date when default is made, unless the payee waives the benefit of the provision. The wording in Article 75 is very specific, in that when a default is made in

payment of an instalment in a promissory note, which provides that in case of default of one or more instalments the whole amount shall be due, time begins to run from the date when the default is made, and the burden is on the payee to plead and prove that he had waived the benefit of the provision whereas under Article 80 the period of limitation provided for is three years from the date when the promissory note "becomes payable" In this connection Article 132 may be referred to It provides a period of twelve years for enforcing payment of money charged upon immovable property from the date when the money sued for "becomes due." The question as to the period of limitation in mortgage bonds providing for payment by instalments with a stipulation that in default of payment of any of the instalments the entire amount becomes due has come for consideration in various decisions. A Bench of this Court in *Narna* v. *Ammani Amma*[1], held that the suits for money due on hypothecation bonds, though containing stipulations for payment in instalments are governed by Article 132 and not by Article 75 The Court agreeing with the view taken by Banerjee, J, in *Gayadin* v. *Jhumanlal*[2], held that the right to sue did not accrue on the date of the first default but only when the date provided for the payment of the principal arrived. The Court posing the question "can it be said that the money sued for becomes due when the first default was made if the mortgagee wants only the principal and the original rate interest?" answered as follows:

> "If the claim is for the enhanced interest it can well be argued that that became due when the first default was committed. When the creditor chooses to exercise the option which limits his claim to ordinary interest it would be straining the language of Article 132, to hold that his right of action accrued when the benefit which he does not choose to avail himself of might have been enforced by him"

The Court also approved the principle of law that no one is obliged to take advantage of forfeiture and cited with approval the decisions in *Ashtley* v. *Earl of Essex*[3], where it was held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it Referring to Lord Danman, C J.'s judgment in *Hemp* v. *Garland*[4], the Bench held that the language of Article 75 of the Limitation Act was borrowed from the above judgment In the opinion of the Bench, whatever might be the view regarding the construction of Article 75, so far as Article 132 was concerned, it was clear that the period of limitation started from date originally fixed for payment of the principal and not from the date of default. This decision was referred to with approval by the Privy Council in *Lasadin* v *Gulab Kunwar*[5], The Privy Council observed :—

> "There can be no doubt that, as pointed out by Lord Blanesburgh a proviso of this nature is inserted in a mortgage deed, 'exclusively for the benefit of the mortgagee' and that it purports to give them an option either to enforce their security at once or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words, by the breach of his contract—mortgage money becomes immediately due, it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgages is, in effect, converted into an option in the mortgagor. For if the latter after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and *eo instanti* as Lord Blanesburgh says, he is entitled to redeem. If the principal money is 'due' and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognised by Wazir Hasan, J., in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem, and in their

1. I.L.R. (1916) 39 Mad 981 : 31 M.L.J 865.
2. I L R (1915) 37 All. 400.
3. (1874) 18 Eq 290.
4. (1843) 4 Q B 519.
5. L R (1932) 59 I A 376 : 63 M L J. 187.

opinion the mortgage money does not ' become due ' within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him."

The Privy Council was of the opinion that the mortgage money does not "become due " within the meaning of Article 132 of the Limitation Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued Characterising Article 75 as in very special terms the Privy Council observed that the time runs under the article not from the date when the money became due but from the date when the cause of action arose Mr. Narayanaswami Aiyar, learned Counsel for the respondent, submitted that the words " becomes payable " in Article 80 are akin to the words " becomes due " in Article 132, and should be construed in the same manner in which the words in Article 132 had been construed in *Narna* v. *Ammani Amma*[1], and *Lasadin* v *Gulab Kunwar*[2]. In *Jawaharlal* v. *Mathura Prasad*[3], a Full Bench of the Allahabad High Court had to consider the words " becomes payable " in Article 80 and " becomes due " in Article 132. Sulaiman, C J. referring to the decisions of the Privy Council in *Lasadin* v. *Gulab Kunwar*[2], and of the Full Bench of the Allahabad High Court in *Mohamed Hussain* v. *Sanwal Das*[4] observed .—

> " The Bench had to interpret Article 80 read with Article 116, Limitation Act, where the starting point of limitation is the date when ' the bond becomes payable ' The words were not identical with the words ' money becomes due ' occurring in Article 132, but the Bench came to the conclusion that the same consideration applied."

Again the learned Judge in comparing Article 132, where the words are "when the money sued for becomes due," with Article 80, where the words are "when the bond becomes payable " observes that there is an obvious contrast with the words in column 3 of Article 75 where the starting point is " when the default is made " For the purposes of limitation the same consideration is applied to the words "becomes due" under Article 132 and the words becomes payable under Article 80.

In the absence of the special words used in Article 75 in Article 80, I do not see any impediment in applying the principle laid down in *Annamalai Chettiar* v. *Velayudha Nadar*[5], and *Lasadin* v. *Gulab Kunwar*[2] The clause regarding forfeiture is provided for the benefit of the payee and an option given to him to enforce the security in default or to stand by the terms of the document without enforcing the default clause. In the absence of very clear words the principle of law that no one is obliged to take advantage of forfeiture cannot be ignored, and the payee cannot be compelled to take advantage of the forfeiture clause so as to make limitation run against him. Though the wording in Article 80, as pointed out is slightly different, the rule laid down regarding Article 132 is equally applicable to Article 80.

In the result the suit is held to be within time and the judgments and decrees of the Courts below are confirmed and the second appeal is dismissed with costs. No leave.

V M.K. *Second Appeal dismissed.*

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1 I L R. (1916) 39 Mad. 981.
2. L R. (1932) 59 I A. 376 : 63 M.L J. 187.
3 A.I.R. 1934 All. 661
4. A.I.R 1934 All. 397.
5. I.L.R. (1916) 39 Mad 129.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE N. KRISHNASWAMY REDDY.

Babu Rao . *Petitioner**

Electricity Act (*IX of* 1910), *section* 20 (2) (*b*)—*Right of inspection and testing electric wires, fittings etc., in a private premises by the authorised officers or workmen of the Electricity Department—When could be exercised—If such person could be deemed to be public servants while inspecting private installation.*

Penal Code (*XLV of* 1860), *sections* 99, 323 *and* 332—*Public servant of Electricity Department testing private installation without permission of the owner—If acting as public servant during such testing*

Under section 20 (2) (*b*) of the Indian Electricity Act before a licensee or any other authorised person of the Electricity Department can enter any premises to which energy is to be supplied for testing the electric wires, fittings etc, he should give not less than twenty-four hours' notice by writing to the occupier in that regard Strictly speaking the departmental workmen will not have a right to test the main switch of a consumer without complying with the provisions of section 20 (2) (*b*) of the Electricity Act as the main switch belongs to the owner of the premises and not to the department. Hence while testing such a fitting or apparatus like the main switch it cannot be said that the departmental workmen were discharging their duties as public servants

However, as section 99 of the Penal Code restricts the right of private defence as against public servants, though their act may not be strictly justifiable in law, only to cases where there is a reasonable apprehension of death or grievous hurt, a citizen will have no right to assault a public servant entering his premises even though the acts of such public servant may not be strictly justifiable in law.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Fifth Presidency Magistrate, Egmore, Madras, dated 12th November, 1965 in C C.No 9425 of 1965.

G. Gopalswami, for Petitioner.

The Assistant Public Prosecutor, for State

The Court made the following

ORDER.—The petitioner was convicted under section 332, Indian Penal Code, and sentenced to pay a fine of Rs. 100, in default to undergo rigorous imprisonment for four months, by the Fifth Presidency Magistrate, Madras, in C C No 9425 of 1965.

The charge against the petitioner is that he voluntarily caused hurt to P.W. 1 Kuppuswamy, a lineman and Palani (P.W. 2), a helper in the Madras Electricity System at about 10 A.M. on 1st June, 1965, with a view to deter them from doing their duty, namely, inspecting the main switch in the petitioner's house at No 5, Pillayar Koil Street, Triplicane, Madras.

The facts of the prosecution case are briefly these. P.W. 5, J.S Victor, the Supervisor in the Madras Electricity System, Mount Road, Madras, received atelephonic message on 1st June, 1965, from P W. 3 Annamalai Chettiar regarding failure of current in his shop at about 9-40 A M Thereupon he sent for P.W. 1 Kuppuswami, a lineman, P.W. 2 Palani, a helper and P.W. 4 Ganapathy, a wireman to go to the premises in a van and accordingly, they reached the petitioner's house in a van and informed him that they had come for testing the main in his house as failure of current was reported in the neighbouring premises, Nilgiris Coffee Works The petitioner allowed them to see the main They checked the main As there was no defect in the main, P.Ws 2, 3 and 4 wanted to check the main switch. While they were checking the main switch, the petitioner asked them not to touch it; but P.Ws 2, 3 and 4 had told him that according to M.E S. procedure, they had the

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* Crl R C No. 589 of 1966. 25th June, 1968.
and Cr. R P No. 582 of 1966.

right to test the main switch and submit a report accordingly While P.W. 1 was telling the petitioner that he need not get angry and that he would explain to him in detail as to why they were testing the main switch, the petitioner brought a wooden ruler and hit on the left elbow of P.W 1 twice or thrice causing him swelling and bleeding The petitioner brought scissors and caused bleeding injury to P.W. 2 Palani on his left thumb. Thereafter, P.W. 1 Kuppuswamy came out of the house and sent to P.W. 5 a telephonic message about the petitioner having assaulted them. P.W. 5 proceeded to the house of the petitioner and took P Ws 1 and 2 to the Zam Bazaar Police Station P W. 1 gave a complaint (Exhibit P-1) to the police

P.W. 6, Dr G. Deivasigamani, the Casualty Medical Officer, Government Royapettah Hosptal, Madras, examined Kuppuswamy (P.W. 1) and found on him (1) a contusion over the left forearm ; and (2) abrasion superficial over the left forearm ; and issued a certificate Exhibit P-2 in respect of the injuries sustained by P.W. 1. The injuries were simple in nature. P.W. 6 similarly examined Palani (P.W. 2), the same day and found on him an abrasion over left palm and issued the certificate Exhibit P-3. The injury was simple in nature P Ws. 1, 2 and 4 are witnesses to the occurrence

When questioned under section 342, Criminal Procedure Code, the petitioner stated that he did not assault P.W. 1 or P W. 2 and that he could not say for what purpose the witnesses had come to his house. He further added that P.Ws 1 and 2 were pulling out a wire from a box containing private sub-meters. He asked them not to touch his property. They said they would touch it and would demand money for testing it Thereupon, he got upon the bench and closed one door of the box in which the meters were kept and immediately a man standing behind him hit him on his hip with spanner and he turned about and asked them whey they should beat him. They wanted to remove the sub-meters He stopped them from doing it. One of them hit him with a screw driver on his neck When the petitioner raised alaram, P Ws. 1, 2 and 4 ran away.

The petitioner examined two witnesses on his side, Krishnamoorthy (D.W.1) and Sankaramoorthy (D.W 2). They, in substance, corroborated the story of the petitioner. But, however, they were unable to say as to how P Ws 1 and 2 sustained injuries on their person

The learned Fifth Presidency Magistrate accepted the evidence of P.Ws. 1, 2 and 4 that P.Ws. 1 and 2 were assaulted by the petitioner and further found that P Ws. 1 and 2 were assaulted while they were discharging their duties as public servants and, therefore, convicted the petitioner under section 332, Indian Penal Code.

On facts, I do not find any infirmity in the evidence of P.Ws. 1, 2 and 4. P.W. 1 gave complaint immediately after the occurrence. P.Ws. 1 and 2 had injuries on them. The petitioner was unable to explain as to how P.Ws. 1 and 2 sustained injuries. Therefore, there cannot be any doubt that P Ws. 1 and 2 were assaulted by the petitioner as spoken to by them P.W 4 corroborated the evidence of P.Ws. 1 and 2.

The main point that has been urged by the learned Counsel for the petitioner is that the conviction under section 332, Indian Penal Code, cannot be sustained for the reason that it could not be said that while P.Ws. 1 and 2 were testing the main switch, the property belonging to the petitioner, they were discharging their duties as public servants. He further contends that though P Ws 1 and 2 may have a right to test the main, they will not have the right to test the main switch without the permission of the petitioner There seems to be susbstance in the point The learned Counsel depends upon section 20 (2) (*b*) of the Indian Electricity Act which reads thus.

"A licensee or any person authorised as aforesaid may also, in pursuance of special order in this behalf made by a Magistrate of the First Class or in a Presidency Town, by a Presidency Magistrate and after giving not less than twenty-four hours' notice in writing to the occupier enter any premises to which energy is to be

supplied by him, for the purpose of examining and testing the electric wires, fittings, works and apparatus for the use of energy, belonging to the consumer "

There is no doubt that the main switch sought to be tested by the witnesses belongs to the petitioner. Strictly speaking, the wintnesses would not have a right to test the main switch without complying with the provisios of section 20 (2) (b) of the Act Therefore, it cannot be said that while they were testing the main switch they were dischaiging their duties as public servants The conviction under section 332, Indian Penal Code, cannot, therefore, be sustained.

But, however, the petitioner would not have had the right of private defence to assault P.Ws. 1 and 2 even when they were not strictly acting under law while they were testing the main switch belonging to the petitioner Section 99, Indian Penal Code, says that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law

It is, therefore, clear that though the act done by P Ws 1 and 2 were not justifiable in law, yet, since in this case, there was not even a suggestion to show that the petitioner apprehended grievous hurt or death from the public servant, the assault by the petitioner in those circumstances cannot be justified He will, therefore, be liable under section 323, Indian Penal Code, for having caused simple hurt to P.Ws 1 and 2 I, therefore, alter the conviction under section 332, Indian Penal Code, to one under section 323, Indian Penal Code The conviction and sentence under section 332, Indian Penal Code, are set aside.

So far as the sentence under section 323, Indian Penal Code, is concerned, taking into consideration the circumstances of the case, I am inclined to release the petitioner under section 4 of the Probation of Offenders Act I, therefore, direct that the petitioner be released on his entering into a bond in a sum of Rs 100 with one surety for a like amount, to keep peace and be of good behaviour for a period of six months, to the satisfaction of the Fifth Presidency Magistrate, Madras, and to appear and receive sentence when called upon during such period. The fine amount, if paid, will be refunded to him The petitioner shall not suffer disqualification attaching to this conviction as provided under section 12 of the Probation of Offenders Act.

The revision petition is partly allowed, with the modification mentioned above.

R.M. ——— *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Kumbakonam Electric Supply Corporation, Ltd., Kumbakonam, represented by its Management, Oriental Buildings, Armenian Street, Madras *Petitioner**

v.

The Presiding Officer, Labour Court, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 18 (1), 18 (3) *and* 33-*C* (2)—*Scope—Settlement under section* 18 (1) *to bind only the workers represented by the Union at the time of settlement—Worker leaving the employment one year previously—If could claim benefit of settlement under section* 18 (1).

There is a distinction between an agreement under section 18 (1) and an agreement under section 18 (3) of the Industrial Disputes Act arrived at in the course of conciliation proceedings. A settlement under section 18 (1) would bind only the workers who were represented by the Union at the time when the settlement

*W.P. No 4153 of 1965. 2nd July, 1968.

was arrived at and not the workers who had ceased to be members of the Union at the time when the settlement was arrived at The second respondent herein had left the employment under the management nearly a year previously. A worker who has left the employment can no longer be a member of the Union of the workers in that concern Section 33-C (2) read with section 18 (1) gives the right only to the parties to the settlement to take advantage of the settlement and claim the benefit which is capable of being computed in terms of money

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in Claim Petition No 147 of 1965 on the file of the Labour Court, Madras, and quash the order dated 24th August, 1965, and made therein.

D. Meenakshisundaram, for Petitioner

A N Somayajee for *Aiyar & Dolia*, for 2nd Respondent

The Court made the following

ORDER —The second respondent in this writ petition, K Rajagoalan, made a claim under section 33-C (2) of the Industrial Disputes Act, before the Labour Court, Madras, for the award of Rs. 45, representing additional bonus of half a month's basic wages for the year 1960-61 and a further sum of Rs 122-50, being the proportionate bonus for seven months' service which he had put under the management in 1963-64 The managemen t in question is the Kumbakonam Electric Supply Corporation, Limited The Labour Court held both the claims to be established, and ordered payment of the amount of Rs. 167-50. The petitioner who is the management has filed this writ petition under Article 226 of the Constitution, for the issue of a writ of *certiorari* quashing the above order of the Labour Court

So far as the payment of Rs 45 is concerned, though objection was taken for payment of the amount, in the affidavit of the writ petition, when the writ petition is taken up today for hearing, learned Counsel for the petitioner does not press his objection regarding the amount of Rs 45

There remains for consideration only the award of the sum of Rs 122-50 representing the proportionate bonus payable to the second respondent for the seven months of service which he performed under the management. The second respondent admittedly was employed as a typist under the management and he left service on 31st October, 1963 Long afterwards, on 20th October, 1964, the workers' Union of this concern and the management entered into a settlement, one of whose clauses related to the payment of bonus for 1963-64 in the following terms .

> " For the year 1963-64, the management agree to pay bonus equivalent to two months basic wages to all permanent monthly paid employees of the company, as drawn by them in March, 1964, and who have been in continuous service from 1st April, 1963 to 31st March, 1964. Permanent monthly paid employees who entered the service during 1963-64 will be eligible only for *pro rata* bonus The said bonus will be paid on or before the 26th October, 1964."

The main contention urged by the petitioner before me is that the above settlement being one entered into under section 18 (1) of the Industrial Disputes Act, it is binding only on the parties to the settlement, and the petitioner, having left service long previously on 31st October, 1963, could no longer claim to be represented by the Union, at the time when the agreement was entered into on 20th October, 1964, between the Union and the management That this is the correct legal position is made clear by the decision of this High Court in *Workers of B. & C. Co.* v *Commissioner of Labour*[1], where a distinction has been drawn between an agreement under section 18 (1), and an agreement under section 18 (3) of the Act arrived at in the course of conciliation proceedings. Stress was made on this distinction and it was held that a settlement of the present kind under section 18 (1) would bind only the workers who were

1 I L R (1964) 1 Mad. 594 . (1964) 2 M L J. 357 . (1964) 1 L.L J. 253.

represented by the Union at the time when the settlement was arrived at and not the workers who had ceased to be members of the Union at the time when the settlement was arrived at. Obviously, the second respondent herein, Rajagopalan, had left the employment under the management nearly a year previously *viz.*, on 31st October, 1963. It was never his case that, after leaving the service of the management, he was allowed to continue as a member of the workers' Union. A worker who has left the employment under the management can no longer be a member of the Union of the workers in that concern That also is clear. In any event, it was never Rajagopalan's case that on 20th October, 1964, he continued to be a member of the Union, and therefore the agreement between the Union and the management would enure to his advantage. The Labour Court unfortunately has not at all adverted to this aspect of the law. It has assumed that clause 1 (*b*) of the Terms of Settlement above extracted provides for payment of bonus to all permanent monthly employees who were in service during 1963-64 according to the period of service and that this agreement does not preclude ex-employees from getting the benefit. But the last mentioned observation clearly overlooks the provision of the law which restricts such benefit only to the parties to the settlement Section 33-C (2) read with section 18 (1) gives the right only to the parties to the settlement to take advantage of the settlement and claim the benefit which is capable of being computed in terms of money Therefore I am of the opinion that the order of the Labour Court has to be quashed, so far as it directs the payment of Rs 122-50 to the second respondent. Its order is confirmed in respect of the payment of Rs 45 to the second respondent.

The writ petition is allowed in part as above There will be no order as to costs

V M K ——— *Writ Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N. KRISHNASWAMY REDDY.

Kulandaivelu . *Petitioner**

Penal Code (*XLV of* 1860), *section* 224—*Offence under—Person under lawful custody of police officer—Crowd forcibly taking him away from such custody—After release from crowd, not submitting to the custody—Whether commits offence under section* 224—*Intention to escape, whether material.*

Words and Phrases—" *Escape* ".

Section 224, Penal Code, deals with two distinct offences committed independently of each other. The first part of the section requires the following ingredients, namely (1) the person to be apprehended must have been charged for an offence or convicted of an offence, (2) such apprehension must be lawful; and (3) resistance or illegal obstruction offered must be intentional, whereas the ingredients of the second part under the section are (1) the detention must be for an offence; (2) it must be lawful; and (3) escape or attempts to escape from such lawful custody. So far as the first part of the section is concerned, it is very clear that unless it is proved that the resistance or illegal obstruction offered is intentional the offence under that part is not made out. But it is very significant to note that in the second part of the section before the word " escapes " the word " intentionally" is not used. The word " intentionally " is deliberately omitted in the second part as the word " escape " by itself will connote something sinister The word " escape " is defined in the Shorter Oxford English Dictionary as " to gain one's liberty by flight". Running away implies a voluntary act on the part of the man who runs If a person is forcibly taken away from the custody of another, it cannot be said that the person taken away has gained his liberty by running away namely flight and hence such person does not escape. A person voluntarily running away from the lawful custody escapes from such custody. If the word " escape " is

*Crl R C No 1554 of 1966 and Crl. Rev Petn No. 1522 of 1966. 7th August, 1968.

understood in this sense, it is not necessary to read the word "intentionally" with the word "escapes" in the second part of the section where the word "intentionally" is omitted.

If it was intended to make the intention as the gist of the offence of escaping from the lawful custody, the second part of section 224, Indian Penal Code, would have said so. The word "escape" connotes a voluntary act on the part of the person who gains liberty by flight, namely, by running away and, therefore, the intention of the person at the time when that person leaves the custody is not material. If a person is taken away by force from lawful custody by other persons, the person taken away does not voluntarily escape from such custody; but though a person is taken away by force for which he is not responsible, yet, when he is set free, he must submit to the custody as he continues to be in the lawful custody of the officer who had lawfully detained him, even while he was taken away by force by others and after he is released. The gravamen of the charge in the second part of the offence is "escape from the lawful custody." Wherever the person is, after he has been lawfully detained, he is deemed to be under custody. The lawful custody of the person does not cease, the moment he is taken away, by force by someone else. It continues wherever he goes by whatever means. The custody cannot be narrowed down to physical custody. It refers to legal custody. A person who had been lawfully detained cannot gain his liberty by other means excepting by due course of law. It cannot be an excuse for a person in custody to say that he has been taken away by someone and that he has not escaped from the lawful custody at the time when he was taken, after he is set at liberty by the persons who had taken him away.

Held, on facts, the petitioner, though he was forcibly taken away by a crowd, yet his having not submitted to the custody till he was re-arrested, has committed the offence under section 224, by escaping from the custody of the Sub-Inspector.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of Session, Tiruchirappalli Division at Tiruchirappalli, dated 7th November, 1966 and passed in C.A. No. 159 of 1966 (S.C. No. 72 of 1966 on the file of the Third Assistant Sessions Judge, Tiruchirappalli).

Fyzee Mohammed, for Petitioner.

The Assistant Public Prosecutor on behalf of the State.

The Court made the following

ORDER.—The revision petitioner is accused 6 in Sessions Case No. 72 of 1966 on the file of the Third Assistant Sessions Judge, Tiruchirappalli. He was originally charged along with several other accused under sections 147, 148, 224, 225, Indian Penal Code, etc., etc, and tried by the Third Assistant Sessions Judge. Accused 5 and 7 and the petitioner alone were convicted and the rest were acquitted. The petitioner was convicted under sections 234 and 323, Indian Penal Code, and sentenced to undergo R I. for one year and three months respectively by the Assistant Sessions Judge. On appeal, accused 5 and 7 were acquitted of all the charges and the petitioner was also acquitted under section 323, Indian Penal Code, but his conviction and sentence under section 224, Indian Penal Code, were confirmed.

The relevant facts for the purpose of appreciating the contentions raised by the learned Counsel for the petitioner are these:

On the 20th of February, 1966 at about 8 P.M., the Sub-Inspector of Police, Turaiyur, while he was on his rounds with a police party, arrested one culprit on suspicion and sent him to the Police Station under the escort of a Constable. When the rest of the Police party was proceeding towards Palla Street in Turaiyur., they noticed the petitioner coming in the opposite direction pushing a bicycle. He was stopped on suspicion and on search, it was found that he was in possession of I.D. arrack in a bag. The Sub-Inspector of Police arrested the petitioner and was escort-

ing him to the Police Station with the help of a Head Constable and two other Constables. When they were proceeding with the petitioner, on the way 40 or 50 villagers formed themselves into an unlawful assembly with the object of rescuing the petitioner and pushed the Head Constable and the Constables who were escorting the petitioner, whereupon the petitioner made good his escape and joined the crowd. The crowd began to attack the Head Constable and the Constables with deadly weapons. Soon thereafter, the petitioner who had earlier escaped from the Police custody came up with a stick and assaulted the Head Constable on his shoulders, with the result that the Head Constable fell down. The petitioner thereafter escaped. The petitioner was subsequently arrested by the Police on 5th March, 1966, nearly about a fortnight after his escape. On these facts, the conviction of the petitioner under section 224, Indian Penal Code, was confirmed by the appellate Court.

The learned Counsel for the petitioner was unable to challenge the finding of the appellate Court on merits. But, however, he contended that on the facts of this case, the conviction of the petitioner cannot be sustained as the prosecution has not established that the petitioner intentionally escaped from the lawful custody of the Police Officer, in as much as, he was forcibly rescued by the crowd and taken away. In other words, he would contend that at the time of the alleged escape from the lawful custody of the Police Officer, the prosecution should show that the petitioner had the intention to escape and if he was taken by the crowd by using force, even if he had not submitted to the custody of the Police Officer after he was released by the crowd, still he would be committing an offence under section 224, Indian Penal Code as the gravamen of the offence is the intention of the person *at the time of escape from the lawful custody*.

To appreciate this contention, it will be necessary to note carefully the language of section 224, Indian Penal Code, which runs as follows :—

> "Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escape or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

This section deals with two distinct offences committed independently of each other. The first branch of the section deals with intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for any offence and the second branch deals with escaping or attempting to escape from any custody in which he is lawfully detained for any such offence.

In this case, we are concerned with the second part of the offence under this section. The first part of the section requires the following ingredients, namely (1) the person to be apprehended must have been charged for an offence or convicted of an offence; (2) such apprehension must be lawful; and (3) resistance or illegal obstruction offered must be intentional, whereas the ingredients of the second part under the section are (1) the detention must be for an offence; (2) it must be lawful, and (3) escape or attempt to escape from such lawful custody. So far as the first part of the section is concerned, it is very clear that unless it is proved that the resistance or illegal obstruction offered is intentional, the offence under that part is not made out. But it is very significant to note that in the second part of the section, before the word " escapes," the word " intentionally " is not used. It becomes, therefore, necessary to consider, even in the absence of the word " intentionally" in the second part, whether it has to be read with the word " escapes " and that the escape must be intentional. I am of the view that the word "intentionally" is deliberately omitted in the second part as the word " escape " by itself will connote something sinister. The word " escape " is defined in the Shorter Oxford English Dictionary as " to gain one's liberty by flight". Running away implies a voluntary act on the part of the man who runs. If a person is forcibly taken away from the custody of another, it cannot be said that the person taken away has gained his liberty by his running

away, namely, flight and hence such person does not escape A person voluntarily running away from the lawful custody, escapes from such custody If the word " escape " is understood in this sense, it is not necessary to read the word " intentionally ", with the word " escapes " in the second part of the section where the word " intentionally " is omitted

That the word " intentionally " is deliberately omitted in the second part will be clear from certain provisions in the Indian Penal Code where the word " intentionally" is repeatedly used in each part of the offence in the said provisions.

Section 222 of the Indian Penal Code is as follows

> " Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice, for any offence or lawfully committed to custody, *intentionally* omits to apprehend such person, or *intentionally* suffers such person to escape, or *intentionally* aids such person in escaping or attempting to escape from such confinement, shall be punished as follows . .. . . "

In this provision, the word " intentionally" is used in every part of the three offences mentioned in the said section Similarly, section 331, Indian Penal Code, uses the word " intentionally " repeatedly in three parts of the offences mentioned therein.

Section 221, Indian Penal Code, is as follows —

> " Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence *intentionally* omits to apprehend such person, or *intentionally* suffers such person to escape, or *intentionally* aids such person in escaping or attempting to escape from such confinement shall be punished as follows. ...."

It is, therefore, clear from these provisions that whenever the intention is made the gist of the offence, it is said so, clearly in each part of the offence. If it was intended to make the intention as the gist of the offence of escaping from the lawful custody, the second part of section 224, Indian Penal Code, would have said so As already pointed out by me, the word " escape " connotes a voluntary act on the part of the person who gains liberty by flight, namely, by running away and, therefore, the intention of the person at the time when that person leaves the custody is not material. If a person is taken away by force from lawful custody by other persons, the person taken away does not voluntarily escape from such custody ; but though a person is taken away by force for which he is not responsible, yet, when he is set free, he must submit to the custody as he continues to be in the lawful custody of the officer who had lawfully detained him, even while he was taken away by force by others and after he is released. The gravamen of the charge in the second part of the offence is " escape from the lawful custody. " Wherever the person is, after he has been lawfully detained, he is deemed to be under custody The lawful custody of the person does not cease, the moment he is taken away, by force by someone else It continues wherever he goes by whatever means The custody cannot be narrowed down to physical custody It refers to legal custody. A person who has been lawfully detained cannot gain his liberty by other means excepting by due course of law It cannot be an excuse for a person in custody to say that he has been taken away by someone and that he has not escaped from the lawful custody at the time when he was taken, after he is set at liberty by the persons who had taken him away.

The learned Counsel for the petitioner relied upon the following two decisions : *Retta Koravan, In re*[1], and *King Emperor* v *Lachhu Kumara*[2] The latter decision was followed in the former. In the former decision, Somasundaram, J., held in relation to the facts of that case that " if the accused was forcibly snatched away from the

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1 (1957) M L J (Crl) 405 2. A I R. 1950 Orissa 62

custody it cannot be said he intentionally escaped from the custody." There is no discussion in that judgment about the language used in section 224, Indian Penal Code, but I find that the observations made in *King Emperor* v. *Lachhu Kumara*[1] were merely incorporated. There is no assistance in that decision as to what happens to the person forcibly taken away, after he is set at liberty—whether he should submit to the custody or not. In *King Emperor* v. *Lachhu Kumara*[1], the discussion proceeded mainly on the facts of that case that the person who was prosecuted under section 226, Indian Penal Code, was not proved to have been under lawful custody when he was taken away and that was the main reason for holding that the offence under section 224, Indian Penal Code, was not made out. It is true, an observation was made that if a person was forcibly snatched away from the custody, it could not be said that he intentionally escaped from the custody and the key word in section 224, Indian Penal Code, is "intentionally." With great respect, I am unable to agree with the last sentence in the observation that the key word in section 224, Indian Penal Code, is "intentionally" for the reasons I have already given in the earlier portion of this judgment.

The following decisions held a different view from the decision mentioned above. In *Queen Empress* v. *Muppan*[2], the following observations were made:

> "The custody of a prisoner does not necessarily come to an end because the custodian absents himself for a few minutes. A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law."

With great respect, I agree with those observations and I am bound by them. Unfortunately, this decision was not brought to the notice of the Court in *Retta Koravan, In re*[3]. This decision was later followed in the *Public Prosecutor* v. *Ramaswami Konan*[4], again, the Division Bench of the Madras High Court in *The Public Prosecutor* v. *Sennimalai Goundan*[5], followed the earlier decision

In *Attiva* v. *Emperor*[6], the Madras decisions were followed The facts of that case are similar to the present case. The accused in that case who was in lawful custody of the process-server was rescued by a number of his friends and he took advantage of this and disappeared. He surrendered on the next day. It was held that the offence under section 224, Indian Penal Code, was committed.

In the result, I am of the view that the petitioner, though he was forcibly taken away by a crowd, yet his having not submitted to the custody till he was re-arrested, namely, for about a fortnight, has committed the offence under section 224, Indian Penal Code, by escaping from the custody of the Sub-Inspector who lawfully detained him for the offence. Even on the facts, I find that after the petitioner was rescued, he again came and used force on the officers and ran away. The conviction under section 224, Indian Penal Code, is confirmed.

So far as the sentence is concerned, it appears that the petitioner had been in jail for about three weeks. The offence took place $2\frac{1}{2}$ years ago. Most of the accused who have been charged along with him were acquitted for one reason or other. Taking all these circumstances into consideration, I reduce the sentence to the period already undergone by him.

The revision petition is dismissed, with the above modification in the sentence.

S.V.J. — *Petition dismissed; sentence modified.*

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1. A.I.R. 1950 Orissa 62.
2. I.L.R. (1895) 18 Mad. 401.
3. (1957) M.L.J. (Crl.) 405
4. (1908) 18 M.L.J. 540 : I.L.R. 31 Mad. 271.
5. (1919) M.W.N. 695.
6. A.I.R. 1923 Rang. 133.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Mohamed Haneefa .. *Petitioner**

v.

Mariam Bi .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488 (3) Proviso—Scope and applicability—Personal law of Muslims permitting a husband having four wives at one time—If a Muslim wife could refuse to live with her husband and claim maintenance on the ground of her husband contracting a second marriage.

The Proviso to section 488 (3) of the Code of Criminal Procedure governs the whole of section 488 and a wife who refuses to live with her husband on account of his contracting a second marriage, will be entitled to claim maintenance under sub-section (1) of section 488 and she need not prove refusal or neglect to maintain on the part of her husband.

Kandaswami v. *Nachammal*, A.I.R. 1963 Mad. 263, referred to.

It is no doubt true that the Muslim personal law permits a husband to have four wives at one time But the Criminal Procedure Code is a general law applicable to all cases giving speedy and summary relief to destitute wife and children, irrespective of their personal law. There is no warrant for restricting the scope of the second proviso to section 488 (3) of the Code as applicable to parties governed by the law of monogamy.

Abdulla Khan v. *Chandni Bi*, A.I.R. 1956 Bhopal 71, differed from.

Syed Ahmad v. *N. P. Taj Begum*, (1958) M.L.J. (Cr.) 496 : A.I.R. 1958 Mys. 128, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Gudalur, dated 4th November, 1966 and made in M.C. No. 143 of 1966.

S. S. Marthandam, for Petitioner.

S. M. Subramaniam, for Respondent.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER.—This revision petition is filed by the husband against the order of the Sub-Divisional Magistrate, Gudalur, in M.C. No. 143 of 1966 granting maintenance at the rate of Rs. 40 per month to his first wife, the respondent herein.

The facts of the case are briefly these: The respondent, Mariam Bi, is the first wife of the petitioner, Mohammed Haneefa, having got married to the petitioner on 22nd May, 1962. They were living as man and wife amicably for sometime. Later, the petitioner married another woman. Since then, the petitioner neglected and refused to maintain the respondent. The respondent filed a petition under section 488, Criminal Procedure Code, before the Sub-Divisional Magistrate, Gudalur, claiming a monthly maintenance of Rs. 50. The Sub-Divisional Magistrate granted maintenance to the respondent at the rate of Rs. 40 per month mainly on the ground that under section 488 (3), Criminal Procedure Code, it would be just for the respondent to refuse to live with the petitioner as he had contracted marriage with another woman and that, therefore, she would be entitled to separate maintenance.

The learned Counsel for the revision petitioner raised two points, namely, (1) that unless it is shown by the wife, notwithstanding the proviso to section 488 (3) Criminal Procedure Code, that he refused or neglected to maintain her, she will

* Cr. R.C No. 1576 of 1966 and
Cr. R.P. No. 1544 of 1966. 22nd August, 1968.

not be entitled to maintenance; and (2) that section 488 (3), Criminal Procedure Code, second proviso, namely, if a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him, would not apply to the personal law of Muslims, under which a husband can lawfully marry more than one wife and that this proviso cannot affect or supersede the personal law.

So far as the first point is concerned, I am unable to agree with the learned Counsel for the petitioner. Sadasivam, J., in *Kandaswami* v. *Nachammal*[1], has discussed the entire case law on this point and held that the proviso governs the whole of section 488, Criminal Procedure Code, and that, therefore, a wife who refuses to live with her husband on account of his remarriage, is not prevented from claiming maintenance under sub-section (1) of section 488, Criminal Procedure Code. The second proviso to section 488 (3), Criminal Procedure Code, has been introduced by Act IX of 1949 making it a just ground for a wife to refuse to live with her husband if he contracts a second marriage. On this point, I respectfully agree with Sadasivam, J.

Even in respect of the second point raised by the learned Counsel, I do not find any substance in it. It is true that the proviso to section 488 (3), Criminal Procedure Code, was introduced by Act IX of 1949 subsequent to the Hindu Married Women's Right to Separate Residence and Maintenance Act coming into force, by virtue of which, the first wife is entitled to claim separate maintenance when her husband takes a second wife. So far as the Muslims are concerned, under their personal law, a husband can have four wives at one time. The contention of the learned Counsel is that the Hindu Law allows by a statute for the first wife to live separately and claim maintenance if the husband marries for the second time, but under the personal law of Muslims, it is not open for a wife to live separately on the ground of her husband having taken another wife and that, therefore, the proviso to section 488 (3), Criminal Procedure Code, will not apply to the personal law of Muslims. There is absolutely no basis for such a contention in respect of the proviso. It does not make any difference between one party or the other. Nor is there any indication to show that it applies only to parties governed by the law of monogamy. On the other hand, the Criminal Procedure Code, is a general law giving a summary and speedy relief to destitute wife and children who are entitled to be maintained by the husband. One cannot read into the proviso what is not found in it because some hardship or inconvenience is caused to a husband governed by the personal law. It is possible that the Legislature might have thought about all these aspects and deliberately introduced the proviso applying to all parties irrespective of the fact what their personal law is. It is not as though that the aggrieved husband has no remedy. He can certainly file a suit to set aside the order of maintenance passed by the Criminal Court if he could successfully make out that under the personal law the wife will not be entitled to get maintenance on the ground that he had taken a second wife. The learned Counsel for the petitioner relied upon a decision in *Abdulla Khan* v. *Chandni Bi*[2]. It has been held in that case that a Muslim woman will have no justification to refuse to live with her husband simply because he had contracted marriage with another wife on the ground that the personal law of Muslims is not affected by the amended proviso to section 488 (3), Criminal Procedure Code. With respect, I am unable to agree with this decision. Unfortunately, in that case, the Judicial Commissioner has assumed that a discrimination is made in the proviso between the Hindus governed by the Hindu Married Women's Right to Separate Residence and Maintenance Act and the Muslims governed by their personal law and justifies such discrimination on the basis of reasonable classification based upon the outlook of persons belonging to the two communities. As already noted, there is nothing in that proviso to infer such a discrimination.

In *Syed Ahmad* v. *N. P. Taj Begum*[3], K. S. Hegde, J., as he then was held that if the parties come within the mischief of section 488, Criminal Procedure Code, they

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1. A.I.R. 1963 Mad. 263.
2. A.I.R. 1956 Bho. 71.
3. (1958) M.L.J. (Crl.) 496 : A.I.R. 1958 Mys. 128.

shall be governed by its provisions notwithstanding their personal law. I respectfully agree with the following observations made in that decision:

"The Criminal Procedure Code is a law of the land and not of any community. If there is a conflict between the law enacted by the Legislature and the personal law then the former prevails. The legislative will is supreme in this land unless controlled by the Constitution."

In the result, I find no substance in any of the two contentions raised by the learned Counsel. So far as the quantum of maintenance is concerned, I am of the view, taking into consideration the circumstances of the case, the status of the parties and the income of the revision petitioner, that the monthly maintenance of Rs. 40 awarded by the lower Court is excessive I, therefore, reduce the maintenance to Rs. 20 per month, which will take effect from the date of order by the lower Court.

With the abovesaid modification, the revision petition is dismissed.

R.M. ——— *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE N. KRISHNASWAMY REDDY.

M. D. Sigamani .. *Petitioner**

v.

Vidyasagaran and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 4 (1) (r) (2)—Pleader—Person acting in any proceeding with the permission of the Court—Additional Public Prosecutor and Assistant Public Prosecutor appearing for accused in private cases—Difference—Permission of Court—How granted.

An Additional Public Prosecutor appointed for a specified period or specified cases does not cease to be an 'Advocate' and there is no prohibition for his appearing in any case for a party as an Advocate if the Government permits him to do so during his period of service as Additional Public Prosecutor. But the position of an Assistant Public Prosecutor is different. He is a full time Government servant and during his period of service his practice as an 'Advocate' is suspended. Hence he cannot appear for any person in any case as a practising Advocate. They cannot appear for an accused in a private case even though they are authorised by the Collector or the Commissioner of Police

Crl. R. C. Nos. 1290 of 1965 and 1049 of 1966, referred to.

But under clause (2) of section 4 (1) (r) of the Code of Criminal Procedure 'Pleader' is defined to include any person appointed with the permission of the Court to act in any particular proceeding. Hence even an Assistant Public Prosecutor can appear in any case if the Court before whom they seek permission to act in any specific proceedings, gives such permission A Court giving permission under the clause must apply its own mind to each individual case and give reasons therefor. The Court should not be persuaded to grant such permission merely because Assistant Public Prosecutors are generally authorised by Government to appear in private case. The Court should consider independently taking all circumstances of the case into account, whether permission should be granted to an Assistant Public Prosecutor to appear for the defence-accused, in private complaints.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (J), Coimbatore in Crl M.P. Nos 705 of 1966, 271 of 1968 and 341 of 1968 in C C.No. 145 of 1966 on his file and dated 26th April, 1968.

Petitioner in person.

The Public Prosecutor, for State.

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*Cr. R.C. No. 559 of 1968 and Cr. R. P. No. 549 of 1968. 23rd August, 1968.

The Court made the following

ORDER.—This revision petition has been filed by the petitioner, M. D. Sigamani, against the order of the District Magistrate, Coimbatore, permitting the Additional Public Prosecutor, Coimbatore, Sri R. S. Gopal to appear for accused 13, and Assistant Public Prosecutor-I for the Jail Department accused and Assistant Public Prosecutor-II for the other police accused, in C. C. 145 of 1966 on his file. The accused in the said case appear to be officials.

So far as the appearance of the Additional Public Prosecutor is concerned, I do not think that any permission is required for him to appear before the District Magistrate, if the Government permit him to do so during the period he serves as Additional Public Prosecutor for the State. An Additional Public Prosecutor by virtue of his position as a Public Prosecutor appointed by the Government for a specific period and for specific Courts does not cease to be an Advocate. There is no prohibition for an Advocate to appear for any party in any case if he can satisfy the Court before which he appears that he is an Advocate as defined under the Advocates Act.

So far as the Assistant Public Prosecutor-I and Assistant Public Prosecutor-II are concerned, the position is different. They are full-time Government servants. During the period they are under the employ of the Government, though they are qualified to be Advocates, they cease to be Advocates, namely, that their practice as advocates is suspended during that period. It has been pointed out by this Court in an earlier decision in Crl. R.C. Nos. 1290 of 1965 and 1049 of 1966 that the Assistant Public Prosecutors, who are full-time Government servants, cannot appear in any case for any person as practising Advocate since their practice is suspended, and it has also been pointed out that they cannot appear on the ground that they are authorised by the Collector or the Commissioner of Police as the case may be, to appear for the accused in a private case. It is clear from the definition of 'Pleader' in clause 2 of section 4 (1) (*r*) of the Criminal Procedure Code that a Pleader includes any person appointed with the permission of the Court to act in such proceeding. Therefore there cannot be a bar for the Assistant Public Prosecutors who came under the category of persons mentioned in clause (2) of section 4 (1) (*r*), Criminal Procedure Code for appearing in any case if the Court before whom they seek permission to act in any specific proceeding gives such permission. In the same decision, it has been made clear that the Court giving permission under clause (2) of section 4 (1) (*r*), Criminal Procedure Code, must apply its mind in each individual case before permitting such persons to appear and also give reasons therefor. It appears that the decision in Crl.R.C. Nos. 1290 of 1965 and 1049 of 1966 was brought to the notice of the District Magistrate, Coimbatore. In spite of this, I do not find anywhere from the records as to whether the District Magistrate has applied his mind in giving permission to the Assistant Public Prosecutor-I and Assistant Public Prosecutor-II to appear for the defence. The Court shoud not be merely persuaded by the fact that the Assistant Public Prosecutors were authorised by the Government to appear in the case, but should consider independently taking into consideration the all-round circumstances of the particular case as to why such permission should be granted to the Assistant Public Prosecutors, who are full-time Government servants. The Court must also give reasons for giving such permission

This matter is sent back to the District Magistrate, Coimbatore, to re-consider whether the Assistant Public Prosecutors-I and II should be permitted to appear for the defence. In doing so, as pointed out by me, he should not be influenced by the fact that the Collector or the Government had authorised the Assistant Public Prosecutors to appear for the accused. But he must come to his conclusion independently whether such permission should be granted, and if so, should give reasons therefor in writing. The District Magistrate will dispose of the matter according to the directions given in this order. Orders passed accordingly.

R.M. *Order accordingl*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

R. Sivagnanam and another .. *Petitioners**

v.

Everest Boarding and Lodging by its Managing Partner R. Manoharan .. *Respondent.*

Madras Buildings (Lease and Rent) Control Act (XVIII of 1960), *sections* 4 *and* 30—*Building—Meaning of—Cost of site on which the building stands—Multi-storeyed building—Apportionment of site value—Certain floors exempt under section* 30 *of the Act—If could be taken into account in apportioning the site value.*

It is a principle of interpretation in regard to jurisdiction of judicial and quasi-judicial forums that, if in order to give relief, which is within its competence, it i necessary to touch upon and deal with a matter outside the purview of the forum it would be quite lawful to deal with such a matter as an ancillary to the jurisdiction vested in the forum in respect of the relief within its jurisdiction. If a part of a building is within the purview of the Madras Buildings (Lease and Rent) Control Act, 1960 and the rest of it is outside it and the Rent Controller is called upon to fix a fair rent for the portion within the purview of the Act, necessarily the entire building will have to be valued and the Rent Controller will have ancillary jurisdiction to take into account the exempted portions also for the purpose of apportioning the site value.

Petitions under section 25 of Madras Act XVIII of 1960 praying the High Court to revise the order of the Court of Small Causes (Chief Judge), Madras dated 11th August, 1965 and passed in H R.A. Nos. 171 of 1964 and 164 of 1964 respectively. (H R.C. No. 1847 of 1963 and H.R C. No. 1968 of 1963) respectively on the file of the Rent Controller (Additional), Madras.

T.T. Vijayaraghavan, for Petitioners.

R. Mathrubutham and *T. S. Sundaresa Iyyar,* for Respondent.

The Court delivered the following

JUDGMENT.—These petitions by the tenants of the ground floor arise out of petitions for fixation of fair rent. Two matters are argued: (1) regarding the enhanced market value fixed by the Court below for the site on which the building stands, and (2) regarding the distribution of the entire market value of site over the ground floor ignoring the first, second and third floors. The finding on the first question is factual and the learned Counsel for the petitioners himself realising this position did not and could not press it. But his contention on the second point is of substance. He says, quite justifiably, that the cost of the land on which the whole building is situate should not be solely assigned to the ground floor in arriving at the fair market value for that floor.

Section 4 of the Madras Buildings (Lease and Rent) Control Act, 1960 provides for fixation of fair rent and the procedure to be followed for the purpose. Section 4 (2) (*a*) (ii) of the Act is in point to the present case. The fair rent for any residential building is to be at 6 per cent gross return per annum on the total cost of such building. The market value of that portion of the site on which the residential building is constructed is component of the total cost of the building A building for the purpose of the Act is defined as one let or to be let separately for residential or non-residential purposes. But this definition does not prevail if the context is repugnant, for the definition in the section opens with the words " unless. the context otherwise requires ". It is true having regard to this definition of a building under section 30, the Act would be inapplicable to the first, second and third floors because they are used as lodging rooms. But the ground floor, it is not in controversy

* C.R.P. Nos. 635 and 636 of 1966. 2nd February, 1968.

is governed by the provisions of the Act. That means the Rent Controller will have jurisdiction and should exercise his power to fix the fair rent for the ground floor.

Mr. Mathrubutham for the respondent argues that because the first, second and third floors are outside the purview of the Act, in the computation of fair rent it would not be competent for the Rent Controller to take into account the first, second and third floors and that the entire market value of the site on which the ground floor stands should be taken into account in fixing the cost of the building. Apart from the fact that the argument involves a gross injustice, I am inclined to think that the Court is not driven to accept that construction. It is a principle of interpretation in regard to jurisdiction of judicial and quasi-judicial forums that, if in order to give relief, which is within its competence it is necessary to touch upon and deal with a matter outside the purview of the forum it would be quite lawful to deal with such a matter as ancillary to the jurisdiction vested in the forum in respect of the relief within its jurisdiction. Further, the language "the market value of that portion of the site on which the residential building is constructed" has to be construed in a liberal way and building in that expression is the entire building, not merely that part of the building which is within the purview of the Act. If a part of a building is within the purview of the Act and the rest of it is outside it, and the Rent Controller is called upon to fix a fair rent for the ground floor necessarily the entire building will have to be valued and for doing so, in my opinion, the Rent Controller will have jurisdiction. In order to fix the fair rent for the portion within the purview of the Act, he has necessarily to take the entire building which is an ancillary matter. A building is not to be cut up in the manner in which the respondent wants to do so as to inflate the cost of the ground floor. Further there is nothing in the Act which requires in such circumstances, to assign the entire land cost to the ground floor alone.

The petitions are allowed with costs, one set Counsel's fee Rs. 25 in each. The matters are remitted to the Rent Controller for revising the fair rent in the light of this judgment.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE K VEERASWAMI AND MR JUSTICE T. RAMAPRASADA RAO.

S R Varadarajulu Naidu . *Appellant**

v.

The Papanasam Labour Union, Vikramasingapuram, Ambasamudram Taluk, and others .. *Respondents.*

Limitation Act (IX of 1908), section 10—Suit against trustees—Specific purpose—In writing—No express mention in a formal deed, necessary—Vesting in trustee—Means absolute control of trustee over property—Trustee, legal owner for application of property—Unregistered trade union—Secretary—Building fund—Collection of funds from labourers—Receipts showing the purpose—Funds in the absolute control of Secretary—No right in the subscribers to the return of funds—Suit for accounts and recovery—Falls within the section—No limitation—Article 120—Not applicable.

Trust—Collection of funds by Secretary of unregistered trade union—Subsequent registration of the trade union—No failure of the purpose—Subscribers suing in a representative capacity along with the registered trade union—Suit sustainable—Practice

The appellant as Secretary and President of an unregistered Labour Union collected subscriptions from Mill labourers between 1938 and 1943 and issued printed receipts The respondents the Labour Union (subsequently registered) and other labourers suing in a representative capacity filed the suit against the appellant for rendering of accounts and recovering moneys On a criminal complaint preferred by a labourer on 19th July, 1943 the appellant was convicted of the offence of criminal breach of trust On 11th May, 1943 the complainant

* L.P.A. No. 9 of 1964. 8th September, 1967.

in the criminal case and oher labourers sent a notice to the appellant calling upon him to render accounts in respect of the collections, but the notice was returned because the appellant refused to receive it. On 1st April, 1953, a lawyer's notice was sent to the appellant who replied denying his liability The suit was instituted on 25th April, 1953. On the question of limitation, a single judge of the High Court in the second appeal held that the suit was in time under Article 120 of the Limitation Act The Appellant appealed to a Division Bench.

Held, section 10 of the Limitation Act governs a suit and there is no question of its being instituted out of time Article 120 of the Act is not applicable.

Section 10 contemplates a suit against a person in whom property is vested in trust for any specific purposes for the purpose of following in his hands such property or for an account of such property. Such a suit shall not be barred by any length of time

So long as the purpose specifically appears in writing, that will satisfy the requirements of section 10 It is not necessary that the purpose should only find an express mention in a formal document A further requisite of section 10 is that the property should have become vested in the trustee for any specific purpose. Vesting in the context means that the trustee has absolute control over the trust property. It may also imply that the trustee as such is the legal owner of the property which he has to apply for purposes of the trust.

On facts:

Both the requisites of section 10 are satisfied in this case. The receipts issued under the signature of the appellant for subscriptions collected by him from the labourers themselves mentioned expressly the purpose, namely, they were to go into the building fund These receipts were issued contemporaneously with the collection of funds from the labourers There is also no doubt from the record that the appellant had absolute control over the funds he had collected and they were at his disposal They were vested in him in trust as a building fund and for other purposes recognised by the Trade Unions Act. The labourers, who contributed the funds, retained in themselves no right to get them back In that sense, there was also a transfer to the defendant of the ownership of the funds but as a trustee.

There was no failure of the purpose of trust because the unregistered body came to an end with the application for registration by the union under the Trade Unions Act The registered union is but a successor of the unregistered union. In any case, the labourers of the unregistered body are still suing in a representative capacity. Hence the suit is maintainable.

Also held,

Article 120 of the Limitation Act is not applicable to the facts of the case.

Case-law discussed.

Appeal under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Anantanarayanan, dated 11th October, 1963 and passed in S A. No 850 of 1961 preferred against the decree of the District Court, Tirunelveli in A S. No 248 of 1960 (O S No. 362 of 1953, Sub-Court, Tirunelveli).

K. K. Venugopal, for Appellant.

S V. Rama Iyengar and *T. N Appusami* and *T. N Sundaram*, for Respondents.

The Court delivered the following

JUDGMENT—This is an appeal by the defendant under the Letters Patent against the judgment of Anantanarayanan, J, as he then was Agreeing with Courts below him, he held that the suit was within time. The correctness of the

view is the only question for consideration. There were other points in controversy which were decided at the earlier stages, but none of them now survives.

The appellant as President and Secretary of the Papanasam Labour Union, which was then unregistered, collected subscriptions between the middle of 1938 and April, 1943 from the labourers in the Papaansam Mills and issued printed receipts, some of which were statedly for the building fund. The suit out of which this appeal arises was for rendition of accounts and for recovery from the appellant of such amount as might be found due from him to the respondents. Respondents 2 to 5, who are among the labourers of the Madurai Mills at Ambasamudram before 16th October, 1943 figured as plaintiffs 2 to 5, for themselves and as representing the other labourers, they having obtained leave under Order 1, rule 8, Civil Procedure Code.

On 16th October, 1943 the Papanasam Labour Union, Vikramasingapuram, was registered under the Trade Unions Act, 1926 and was the 1st plaintiff in the suit. It was claimed that the defendant had collected from the labourers during the period so much as Rs. 52,000 and that this amount was paid and received by him only as a trustee of the labourers who had subscribed and became vested in him for the specific purpose of being expended and utilised for all or any of the purpose contemplated by the Trade Unions Act, 1926 The plaintiffs charged the defendant with breach of trust and misappropriation of the funds collected by him without expending the same for the benefit of the subscribing labourers. On a criminal complaint filed by one of the labourers on 19th July, 1943, the Sub-Divisional Magistrate, Shermadevi, convicted the defendant of the offence of criminal breach of trust and sentenced him to 18 months', rigorous imprisonment and a fine of Rs 1,000 on 16th June, 1944. The defendant's appeal against the conviction to the Sessions Court and a revision to this Court failed by 6th April, 1945 On 11th May, 1943 the complainant in the crimininal case, who was one of the labourers, and certain other labourers of the unregistered Union sent a notice to the defendant calling upon him to render accounts, but this notice was returned because the defendant refused to receive it. The envelope of the registered notice, it was said, briefly bore the contents of the notice enclosed within. On 1st April, 1953, there was again a registered notice, but this time by a lawyer on behalf of the registered Union, the 1st plaintiff, to the defendant demanding him to render accounts The defendant in his reply dated 8th April, 1953 denied his liability and stated that on 1st April, 1943, the unregistered labour union in its General Body accepted the amount of Rs. 18,345 as representing the correct balance as on that date on accounts admitted or furnished by the defendant and that this resolution was ratified on 18th December, 1949 by the General Body of the 1st plaintiff. The suit was instituted on 25th April, 1953. The defendant resisted it on grounds contained in his reply notice dated 8th April, 1953 and certain others including limitation.

While affirming the preliminary decree for accounts, Anantanarayanan, J., disagreed with the District Judge on appeal and was of opinion that section 10 of the Indian Limitation Act did not apply but Article 120 did and that the suit instituted within six years from 8th April, 1953, the date of the defendant's reply notice repudiating his liability to account, was in time. He summed up his views in relation to section 10 of the Limitation Act thus:

"............. (i) such funds expended with regard to their original objects in the hands of an office-bearer of a defunct association essentially comprise a resulting or constructive trust the beneficiaries being the ex-members who subscribed such funds; (ii) they do not constitute an express trust, because such trust must either be created by an instrument in writing or by a provision of law, or by transfer of ownership in the funds to the trustee; and (iii) where there is no such trust created in writing, and there is equally no transfer of the ownership of the funds, section 10 of the Limitation Act will not apply to save the suit from the bar of limitation.

In applying article 120 of the Limitation Act to the facts and holding the suit to be in time, the learned Judge observed:

"Any other view would lead to the paradoxical result that here a man admits that he received subscription and retained them, and that he is liable to account for them (though the degree of the accounting might be restricted in this view) nevertheless time began to run under Article 120 against the beneficiaries, merely because upon earlier occasions he identified and declined to receive a registered notice or showed the assets at a particular figure with reference to some application for registration forwarded under the Trade Unions Act."

On that view he dismissed the second appeal and granted leave.

Upon a careful consideration, we are of opinion that the conclusion of the learned Judge that the suit was within time is unassailable though our reasons for that view are somewhat different from his We are inclined to think that this is a case of an express trust to which section 10 of the Limitation Act applies and not Article 120 but if that Article were the proper one to apply, the suit would be barred by time.

We shall first deal with Article 120 The application of this Article in the judgment in second appeal is on the view that in the circumstances of the case there was no express trust but only a resulting trust, the beneficiaries being the labourers who gave the subscriptions. If this is the correct view as to the character of the trust, and Article 120 is applicable, we are unable, with respect, to agree that in the circumstances of the case the suit was instituted in time That is a residuary Article which will govern a suit for which no period of limitation is provided for elsewhere in the Schedule to the Limitation Act, 1908. The period of limitation prescribed by the Article is 6 years and the time from which the period begins to run is when the right to sue accrues. The time of accrual of the right to sue may depend on the particular facts relating to the nature of the right claimed, sought to be enforced or denied The genesis of such right may not necessarily be always identical or contemporaneous with the time of the accrual of the right to sue in respect of it. To illustrate, in cases of co-ownership or joint ownership in which possession by one is by law regarded as possession on behalf of all joint or co-owners, the right of any of them to joint possession is not affected by non-participation in the joint act for any length of time but is jeopardized only by a denial of or ouster from his right. It is only then this right to sue accrues and time to enforce his right begins to run against him. If the suit is to recover money lent under an agreement that it shall be payable on demand, the right to sue accrues when the loan is made. But on the other hand, if it is to recover money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable, time for it begins to run when the demand is made. If a suit is against a factor for an account, right to sue for purposes of limitation accrues when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates, just as in the case of a suit by a principal against his agent for movable property received by the latter and not accounted for. *Mussammat Bolo* v. *Musammat Koklan*[1], related to a claim by a joint owner to recover her share in joint movable properties The right to such a share accrued six years prior to the institution of the suit but the denial of that right was within the period. Differing from the Court of the Judicial Commissioner, the suit was held by the Judicial Committee to be within time under Article 120 Sir Binod Mitter who spoke for the Board made the following classical observation at page 627:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted"

How the principle of this observation of the Board was applied to the facts is seen from its following further observations:

"No doubt Mt. Koklan's right to the property arose on the death of Tara Chand but in the circumstances of this case their Lordships are of the opinion that

1 (1930) L.R. 57 I.A. 325 : 59 M L J 621.

there was no infringement of, or any clear and unequivocal threat to, her rights till the year 1922, when the suit, as stated above, was instituted. Mt. Koklan was living as a member of a joint family, consisting of herself, her infant grandson, and daughter-in-law, and they constituted Kanhaya Lal's branch of the family of Sultan Singh The grant of powers-of-attorney by Mts. Sarani and Bolo to a manager to manage the joint property and the method in which the account books were kept, show the way in which the joint properties were managed. Such methods of management are not uncommon amongst Hindus. Their Lordships, therefore, hold that the suit is not barred by limitation "

It is clear that in that case the question when the right to sue accrued depended on the general principles of law relating to co-ownership, namely, short of ouster or denial, possession of one is possession on behalf of all co-owners. In our opinion, the ratio of *Musammat Bolo* v *Mussamat Koklan*[1], is inapplicable to the case before us which is not one of co-ownership *Annamalai* v *Muthu Karuppan*[2], is also a case of a joint right of an assignee from one of the joint decree-holders to which the dictum of Sir Binod Mitter was applied with the following remark:

"Counsel for the appellants admitted that he was unable to specify any date at which the claim to an account here in suit was denied by the appellants."

O. R. M. O. M S. P (Firm) v *Nagappa Chettiar*[3], appears to be somewhat nearer to this case and applied Article 120 from a point of view different from *Mt. Bolo* v. *Mt. Koklan*[1], Certain moneys contributed by the plaintiff and his brother Subramaniam in a certain proportion which constituted a trust, stood invested with the defendant. On a certain date in 1920 the entire moneys due from the defendant to the trust were transferred to the credit of Subramaniam's account with him and his overdraft account was adjusted with the moneys so transferred The plaintiff coming to know of this transaction in 1929 sued the defendant in 1933 to recover the trust property It was contended before the Privy Council that assuming that Article 120 applied, the cause of action arose either in 1920 when the trust money was withdrawn or in 1924 when the banker's agent told the plaintiff that the money had been withdrawn from the bank Factually the plaintiff came to know only in 1929 that the money of the charities was set off against Subramaniam's personal debt to the defendant upon this overdraft. The Board held that limitation under Article 120 for the purposes of the suit began to run only from 1929 when the plaintiff came to have knowledge of the breach of trust Sir George Rankin who delivered the judgment in that case, while noticing that the language of Article 120 makes no reference to the knowledge of the plaintiff in contrast with Articles 90, 91, 92, 95, 96 and 114 and also the dictum of Sir Binod Mitter in *Mt Bolo* v *Mt. Koklan*[1], referred to *Basavayya* v *Bapana Rao*[4], and certain other decisions and observed that the decisions in India had established a rule of limitation under Article 120 by which the plaintiff in the cases to which the rule applied, could not be debarred of his remedy unless with knowledge of his rights he had been guilty of delay. Apparently the Board would have been prepared to hold in that decision that the starting point of limitation under Article 120 in view of *Mt Bolo* v *Mt. Koklan*[1], would be the date of the withdrawal of the money but for the fact that the decisions in India had established a rule of limitation based on knowledge from which the Board did not like to depart It seems to us that the relief in the present suit has been in effect founded on breach of trust committed by the defendant in respect of the moneys collected by him from the labourers. Though the relief sought for includes accounts, the suit is substantially to recover trust moneys. In our opinion, therefore, the right to sue under Article 120 accrues when the defendant in this case committed breach of trust to the knowledge of the plaintiffs On this view, it is not the denial of the defendant to account on which the plaintiff's right to sue accrued.

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1. (1930) L R 57 I.A 325 : (1930) 59 M L J. 621.
2. (1931) L R 58 I A. 1 · 60 M L J. 1 : I L R. 8 Rang. 645 : A.I.R. 1931 P.C. 9.
3. (1940) L R 67 I A 448 : (1941) 1 M L.J. 393 : I.L R. (1941) Mad. 175.
4. 58 M L J 349 · A I R 1930 Mad. 173

The earliest point of time plaintiffs 2 to 5 could be said to have knowledge of the defendant's breach of trust was 11th May, 1943 when one of the labourers sent a registered notice calling upon the defendant to account and in any case 19th July, 1943 when a criminal complaint was preferred against the defendant for misappropriation of the trust funds If Article 120 is the proper article to apply in this case, we are clearly of opinion that the suit instituted in April, 1953 would be for out of time.

But as we said, we think the suit is governed by section 10 of the Limitation Act. That section contemplates a suit against a person in whom property is vested in trust for any specific purposes for the purpose of following in his hands such property or for an account of such property. Such a suit shall not be barred by any length of time. The specific purpose as pointed out by Lord Thankerton in *Annammalai* v. *Muthukaruppan*[1], must be:

> " a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed "

So long as the purpose specifically appears in writing, that will satisfy the requirement of section 10. It is not necessary that the purpose should only find an express mention in a formal document A further requiste of section 10 is that the property should have become vested in the trustee for any specific purpose. Vesting in the context means that the trustee has absolute control over the trust property. It may also imply that the trustee as such is the legal owner of the property which he has to apply for purposes of the trust. We are of opinion that both the requisites of section 10 are satisfied in this case The receipts issued under the signature of the defendant for subscriptions collected by him from the labourers themselves mentioned expressly the purpose, namely, they were to go into the building fund. These receipts were issued contemporaneously with the collection of funds from the labourers. There is also no doubt from the record that the defendant had absolute control over the funds he had collected and they were at his disposal. They were vested in him in trust as a building fund and for other purposes recognised by the Trade Unions Act The labourers, who contributed the funds, retained in themselves no right to get them back. In that sense, there was also a transfer to the defendant of the ownership of the funds but as a trustee It has been suggested for the appellant that the plaintiffs have not specifically pleaded that there was an express trust based on the receipts issued by the defendant But we find that paragraph 6 of the plaint has clearly taken the plea, and some of the receipts issued by the defendant are on record Further the question whether there is an express trust for a specific purpose within the meaning of section 10 has been considered by the Courts below and in the second appeal. We are also unable to accept the view that there was failure of the purpose of the trust because the unregistered body came to an end with the application for registration by the Union under the Trade Unions Act. The registered Union is but a successor of the unregistered Union In any case, the labourers of the unregistered body are still there and as we mentioned earlier, plaintiffs 2 to 5 have sued in a representative capacity. The prayer in the plaint is for a decree in favour of the plaintiffs. In our opinion, therefore, *Lakshmanan* v. *Ramaswamy*[2], has no application to the facts of this case. Section 10 of the Limitation Act governs the suit and there is no question of its being instituted out of time.

The appeal fails and is dismissed with costs

V S *Appeal dismissed.*

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1. (1931) L R. 58 I A 1 : 60 M L J. 1 · I L R. 8 Rang 645 . A I R (1931) P C. 9

2 (1938) 1 M.L J 616 : A I R. 1938 Mad. 641.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.)

PRESENT :—MR JUSTICE K S. RAMAMURTI

M. V. Savithri Ammal .. *Plaintiff**

v.

The Secretary, Revenue Department, Government of Madras, Fort St. George, Madras 9. .. *Defendant.*

Will—Construction—Principles—Will providing for a gift to one person and on its failure for a gift over to another—Prior gift failing but not in the manner contemplated by testator—Gift over if can still take effect

Succession Act (*XXXIX of* 1925), *sections* 129 *and* 130—*Relative scope and applicability*

In interpreting a will the Court has to ascertain the intentions of the testator as declared by him and apparent in the words of his will The testator has conveyed the expression of his wishes in the words employed by him in the document and all the parts of the will should be construed and read together with reference to each other, while effectuating the intentions of the testator As so often said, on a question of true interpretation of a will, decisions on the construction of other wills are useful only for the limited purpose, in so far as they lay down the principles of law which have to be observed in the construction of wills. Courts should not form any preconceived notions about the intentions of the testator, based upon some decision apparently containing similar language and then enquire, how far the will in question resembles the will or wills referred to in judicial decisions.

By his will a testator bequeathed his properties to his wife for life and thereafter to his daughter *K* for life without power of alienation After the lifetime of *K* the properties were to be absolutely enjoyed by the children of *K* In the event of *K* dying issueless or leaving no adoption the properties were to be handed over to the Government of Madras for medical relief to suffering humanity. *K* died even before her marriage and *S* survived her. On the question whether the Government was entitled to claim the properties

Held, the intention of the testator was that the gift in favour of the Government should take effect only if the wife died first, the daughter survived and died without issue thereafter. It was not and could not have been the intention of the testator that even if his wife survived the daughter (thereby ruling out any question of there being any children of hers) the Government should take the properties even in that contingency. Hence the residuary estate lapsed in favour of *S* and under section 14 of the Hindu Succession Act she became the full and absolute owner of the properties.

[Case law, both English and Indian, and the relative scope and applicability of sections 129 and 130 of the Succession Act (XXXIX of 1925) discussed in the judgment].

Suit by Originating summons for construction of a will.

V. K. Thiruvenkata Chari, *A K. Sriraman* and *A. S. Kailasam*, for Plaintiff.

G. Ramaswamy and *Additional Government Pleader*, for Respondent.

The Court delivered the following

JUDGMENT —Savithri Ammal, the plaintiff, has taken out this Originating Summons for the construction of the will dated 6th September, 1948 of her late husband, M. G. Venugopal, who died in about 1949 leaving the will aforesaid bequeathing his properties to his wife with certain bequests for payments of money for his other relatives. She obtained a probate of this will in O P No. 140 of 1949. The relevant clause in the will which has to be construed by this Court runs as follows :—

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*C.S. No 164 of 1966 (O S.) 12th February, 1968.

"I hereby bequeath all my immovable properties wherever situate and moveable properties such as furniture, utensils, cash, bank deposit etc., to my wife Mrs. M. V. Savithri Ammal to be enjoyed by her during her lifetime and thereafter to my daughter Miss M. V. Kalyani to be enjoyed by her during her lifetime without power of alienation. After the lifetime of my danghter Miss. M.V. Kalyani, the properties then remaining shall be absolutely enjoyed by the children of my daughter, to be taken in equal share

In the event of there being no children, male or female to my daughter Miss M. V. Kalyani, I give her the right to adopt a heir or heirs if she so desires, but in the event of her dying issueless or leaving no adoption all my properties shall be handed over to the Government of Madras for medical relief to suffering humanity especially children's diseases"

The testator died in 1949 and his daughter, Kalyani, died in September, 1955, when she was aged about 21 years. The contention of the plaintiff is that the ultimate provision in the will that all the properties of the testator shall be handed over to the Government of Madras for medical relief cannot take effect, that there has been a resultant intestacy and lapse with the result that she became entitled to the entire properties, and that under section 14 of the Hindu Succession Act of 1956 she has become the sole and absolute owner of the properties in question. Her contention is that in the instant case the principle or the rule embodied in section 130 of the Succession Act of 1925, (corresponding to section 117 of the Act of 1865) should be applied. On the other hand the contention of the Government is that the instant case is governed by the rule in section 129 of the present Act, (corresponding to section 116 of the old Act) and that it did not matter in what manner and in what contingency the intermediate bequest in favour of the testator's daughter and/or her children failed

Mr. V. K. Thiruvenkatachari, for the plaintiff, and Mr Ramaswami, the Additional Government Pleader, invited my attention to some of the decisions which have dealt with the releative scope of sections 129 and 130 of the Indian Succession Act. Mr. Thiruvenkatachari also drew my attention to some of the relevant decisions in England in which also the same identical question had been considered.

In interpreting a will the Court has to ascertain the intentions of the testator as declared by him and apparent in the words of his will The testator has conveyed the expression of his wishes in the words employed by him in the document and all the parts of the will should be construed and read together with reference to each other, while effectuating the intentions of the testator. As often said, on a question of true interpretation of a will, decisions on the construction of other wills are useful only for the limited purpose, in so far as they lay down the principles of law which have to be observed in the construction of wills Courts should not form any preconceived notions about the intentions of the testator, based upon some decision apparently containing similar language and then enquire, how far the will in question resembles the will or wills referred to in judicial decisions. It is necessary to remember the significant note of caution of Joyce, J, in *Sanford* v. *Sanford*[1]:

"The rule is to construe a will "*ut res magis valeat quam pareat*" and to give effect, so far as possible, to all the words used by the testator............It has been said by the Court of Appeal that the true way to construe a will is to form an opinion apart from the decided cases and then to see whether those decisions require any modification of that opinion, not to begin by considering how far the will in question resembles other wills upon which decisions have been given."

The crucial question in the instant case is in what contingency did the testator intend that the final bequest in favour of the charity should take effect. At the same time when he executed the will, the daughter, Kalyani, was aged about 14. The testator desired to provide for his wife, for his daughter, and the daughter's children, male or

1 L.R. (1901) Ch 939

female, failing that, to any heir which the daughter, Kalyani, may adopt In the then set up of the family of the testator, it is quite clear that his intention was that his wife should enjoy all the properties during her life-time and the daughter should get the properties for her life-time without powers of alienation, only after the death of his wife. In other words, during the wife's life-time the testator was keen and anxious that all the properties should be enjoyed by his wife and further, the children born to the daughter are to take the properties only after the life-time of the duaghter. His intention is clear that the ultimate provision in favour of the Government of Madras should take effect only after the enjoyment of his properties by his wife, after the enjoyment of the properties by the daughter, and only if the daughter dies after marriage without leaving any issue. The testator is keen about exhausting the enjoyment of the properties by his wife, and daughter and grandchildren, if any, and the Government to take the properties only in the contingency of the daughter surviving the mother, enjoying the properties and then dying issueless. I am clear in my mind that it is impossible to import into this will the notion or idea that the testator intended that the properties should go to the Government, whether or not the daughter survived the mother. On the other hand, I am of the view that it was not and could not have been the intention of the testator that even if his wife survived the daughter (thereby ruling out any question of there being any children of hers) the Government should take the properties even in that contingency. In interpreting the will the Court cannot ignore the natural background and the normal events which a father or husband would expect in his home consisting of himself, his wife and his unmarried daughter. In this case I find it impossible to hold that the testator visualised the idea that his young daughter would pre-decease his wife, even before her marriage, and even in that contingency of the wife, the only member of the family, living, the testator desiring that the property should go to the Government. Having considered all the aspects of the matter, I hold that the intention of the testator was that the gift in favour of the Government should take effect only if the wife died first, the daughter survived and her dying without issues thereafter. The failure of the bequest in favour of the children of the daughter should take place not in any other manner whatsoever but only in the specified manner (which is quite a natural and a normal one) *i.e.*, the daughter taking a life interest, the wife having died earlier, and there being no other member of the family

I shall now refer to some of the decisions in which certain rules of construction have been laid down and indicated as to the relative scope of sections 129 and 130 of the Succession Act and the applicability of the rule of interpretation in England laid down in the leading case, *Jones* v. *Westcomb*[1]. The principle enunciated in that case and the other cases in England has been incorporated as the key note for the corresponding statutory provision, sections 116 and 117 of the Act of 1865, corresponding to sections 129 and 130 of the present Act.

In *Jones* v. *Westcomb*[1], the testator bequeathed a term of years to his wife for life, remainder to the child she was then *enciente* with, and, if it died under twenty-one, a third part of the term was to belong to his wife, and the remaining two-thirds to other persons Although the wife was not *enciente* when the will was made Lord Harcourt determined that the devise to her was good The only event in which the property was to be disposed of in that case was on the death of the child before 21 Though in fact the wife was not *enciente* at all, it was held, nevertheless, that the latter bequest took effect. It is the principle underlying this case and the cases which have applied this rule that has been incorporated in section 129 of the Indian Succession Act.

The exact scope of the rule laid down in *Jones* v *Westcomb*[1], was construed in numerous subsequent decisions in England, and it is now well settled that the rule

1. 1 Eq. Cases 245.

in *Jones* v *Westcomb*[1], would apply only to those cases where the Court looking at all the relevant circumstances of the case, including the terms of the will, comes to the conclusion that the testator must " *afortiori* " have intended " *the disposition over* " to take effect in the contingency or the event that had actually happened, although it is not the event which the testator has specified in his will as the one on which the gift over is to take effect Vide 39 Halsbury, page 1145, paragraph 1688 (Simonds Edition)

I shall now refer to the decision in *Re Bailey Barret* v *Hyder and others*[2], which contains a discussion of the relevant decisions dealing with the exact scope of the rule in *Jones* v *Westcomb*[1] That decision enunciates the rules that where there is a failure of a prior bequest the Court in order to uphold the disposition over must be satisfied (on a true construction of the will) that the testator clearly intended the gift over to take effect in the subsequent events which had actually happened, though not expressly provided for in the will The judgment of Evershed, M R contains a very useful and interesting discussion and in particular, the scope of the rule in the two earlier decisions, *Re Fox's Estate*[3], and *Re Bowen*[4]. The following is the head-note which contains the relevant portions of the will and the decision of the Court

> "By her will, dated in April, 1929, a testatrix gave her residuary estate to trustees on trust for conversion and investment and 'to pay the income arising therefrom to my (daughter *E*) during her life and after her death as to capital and income in trust for my sister-in-law (*M*) absolutely if she shall be living at the death of my said daughter but if she shall predecease my said daughter then upon trust for my nephew (*C*) absolutely.' In July, 1935 *E* died, and in March, 1944 *M* died In February, 1949, the testatrix died, without having altered her will. *G* claimed to be absolutely entitled to the residuary estate.
>
> *Held*, the gift to *M* lapsed for a reason independent of the condition imposed by the will, namely, her death during the life-time of the testatrix; the gift to *G* was limited to operate only if *M* predeceased the daughter; *in the circumstances it did not appear that the testatrix must* a fortiori *have intended the disposition over to G to take effect in the event which had actually happened* the principle in *Jones* v. *Westcomb*[1] did not apply; and therefore the gift to *G* did not take effect."

It will be apparent from the head note that the gift to the sister-in-law failed for reasons, *de hors* the conditions of the will. Is the sister-in-law having predeceased the testator? I may first extract the following observations of Evershed, M R as to the proper perspective of approach in such a context at page 392

> " It will be seen that an event, therefore, occurred for which in terms no provision was made by the will, *viz* , that both the daughter and Mrs Bailey predeceased the testatrix herself. If the result is that the gift over in favour of George Hyder cannot now take effect, it follows that the testatrix has died intestate as to her residue No doubt, that is a circumstance proper to be taken into account in considering the question presented for our determination, for it has been said that certainly where there is ambiguity the Court should tend to that view of the construction which would not produce an intestacy On the other hand, the fact that on a certain view an intestacy would follow does not justify the Court either in giving an unnatural meaning to the words or altogether rewriting the will so as to produce a result which might appear to be more satisfactory."

Dealing with the statement of the law in Theobald on Wills and *Jones* v. *Westcomb*[1] the law is stated thus at page 394

> " From these passages, if they are correct, it would appear to follow that the law stands thus, if there is a gift to take effect on a certain condition, plus a gift over on non-fulfilment of the condition, and the first gift lapses for reasons independent of the condition, the Court, generally speaking, cannot by inserting some new

1. 1 Eq. Cases 245
2. (1951) All E.R. 391.
3. (1937) 4 All E.R. 664.
4. (1948) 2 All E.R. 979.

passage in the will get rid of the effect of the lapse and fill the gap which it has created. If as I think, that is the law, it must apply to this case. There was here a gift after the death of the life tenant (the daughter) to pay the capital and income to Mrs. Bailey absolutely if she should be living at the daughter's death She was, of course, living at the daughter's death, but the gift lapsed because she was not living at the testatrix's death. The will provided for the alternative event—alternative, that is, to the condition attached to the first gift—if Mrs. Bailey should predecease the daughter, which she did not do, Mrs. Bailey, having survived the daughter, would if she had survived the testatrix, have taken the residue absolutely, but her not surviving the testatrix caused the gift to lapse. In other words, the gift did not fail as a result of the non-fulfilment of any condition or term imposed by the will, but because the law requires that a beneficiary under a will should survive the testatrix in order to take the benefit conferred."

After approving the statement of the law by Eve, J, in *Re Graham*[1], Evershed, M R. further observed that even if the Court of construction was of the view that if the particular subsequent contingency had occurred to the testator, the testator would have still desired, the gift over, to take effect, would not be decisive on the question, as the Court in that event would be re-writing a will and not construing it. Vide observations at the bottom of page 394. It has to be noted in this connection that in that case all the Judges were of the opinion that the testator, if posed with the problem of the peculiar turn of subsequent events, would have still desired that the gift over should take effect. But in the instant case even if one should speculate, even if such speculation is permissible, I am of the view that the testator would have only allowed his wife to take the property and not leave it to the Government The idea of leaving to Government according to the testator is conditional upon his wife enjoying the property, then his daughter enjoying the property and dying leaving no issues. The case in *re Fox's Estate*[2], was then considered at page 397 and distinguished as turning upon the peculiar terms of that will Jenkins, L J., who concurred with the Master of the Rolls put the matter thus at page 401 :

"In my view, it is impossible to hold that the testatrix contemplated or provided for this combination of events at all. It may very well be that had it been pointed out to her that the sequence of events which took place might happen and that in such case there would be an intestacy, she would have been anxious to supply the deficiency, and in all probability she would have said that in those circumstances also she wished her nephew George to take But it is one thing to say that, if it had been pointed out to the testatrix that she had not provided for a certain eventuality, she would probably have provided for it in a certain way, and *quite another to hold that the contingencies expressed in her will in clear terms must be added to or altered in order to give effect to what would probably have been the testatrix's intention if she had appreciated that the contingencies as expressed did not provide for that other possible state of affairs.* That course, I think, clearly is not open to us on the authorities, or, indeed, on any principle of construction. In my view, this case falls within the principle stated in *Tarbuck* v. *Tarbuck*[3], and in *Brookman* v. *Smith*[4], as opposed to the line of cases in which the *Jones* v *Westcomb*[5], principle has been adopted This is a case in which, as in *Re Graham*[1], the first taker of an absolute interest under a term of the will had satisfied the condition of the gift in the life-time of the testatrix and the testatrix cannot be supposed to have contemplated the failure of the gift by lapse. The condition on which the sister-in-law was to take had been fulfilled in the testatrix's life-time by her surviving the daughter, and the failure was due to lapse and lapse alone."

This passage effectively answers the contention of the learned Additional Government Pleader that the testator's intention if one can speculate, was to ultimately leave the property to charity.

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1. (1929) 2 Ch 127.
2. (1937) 4 A.E.R. 664.
3. (1835) 4 L.J. Ch. 129.
4. (1872) L R. 7 Exch 271.
5. 1 Eqs. Cases 245.

In view of the detailed and elaboate discussion of the two decisions, *Re Fox's case*[1] and *Re Bowen*[2], in the latest decision of the Court of Appeal, *Re Bailey (deceased)*[3], particularly the judgment of Evershed, M R, it is unnecessary to burden this judgment with a detailed reference to these two cases It is however important to note that in both the earlier cases the Court held that on a proper interpretation of the terms of the respective wills, the gift over, took effect even though the failure of the prior bequest was for a different reason The observations of Green, M R, in *Re Fox's case*[1], show that the learned Master of the Rolls rested his reasoning mainly upon the true interpretation of the words used in that will, and held that on the language of that will the gift over was sufficient to cover other contingencies, though not specifically mentioned in the will In the latter decision, *Re Bowen*[2], Wynn Parry, J, appeared to have decided the case, in the manner he did, by applying the test that if the testator had been asked what should happen in a particular contingency, the testator would have unhesitatingly answered in the manner decided by the learned Judge. This hypothetical test however did not receive full approval in *Re Bailey*[3]. The following observations at page 399 of Evershed, M R carefully read show that the Master of the Rolls was of the view that the decision of Wynn Parry, J, should be confined to the facts of that case and should not be extended, and that Evershed, M R even entertained some doubt about the correctness of all the observations of Wynn Parry, J:

At page 399

"Because that case is different from the present case it is unnecessary to say anything more about it *I therefore express no view whether that case was rightly or wrongly decided* That is a matter *beyond the interests of the decision of the present case Suffice it to say* that it did differ in a material respect, at any rate in the view of the learned Judge, and clearly differed in language from this case I think it dos not afford any guidance to the decision of this case, and I, therefore say no more about it".

I may also refer to the statement of the law (on the applicability of the rule in *Jones* v. *Westcomb*[4], in Williams on Wills, 2nd Edition, page 56. The matter is also fully discussed in Jarman on Wills, 8th Edition (1951) in Volume, III, Chapter, 56 page 1055 onwards, where the learned author discusses the rule in *Jones* v. *Westcomb*[4] *i e*, the effect of a failure of the prior gift, and a subsequent disposition over. After an examination of all the cases, including *Re Bowen*[2], (there is no refernce to *Re Bailey*[3] which evidently was decided later), the learned author has summed up the position that in every case the Court should find out, on the terms of the will, an intention on the part of the testator, that the gift over is to take effect in a manner different from that pointed out by the mere grammatical meaning of the words That intention, the Court must be in a position to discover *a fortiori* and unless such an intention is *clearly discernible*, the disposition over, cannot take effect From this analysis of the later decisions in England and the statement of law by leading authors on "Wills", it emerges that the general rule is that in the case of a failure of a prior gift, the gift over does not take effect and it is only "*as an exception*" and in clear cases that the rule in *Jones* v. *Westcomb*[4], should be applied and that the Court ought not to read words into the will which are not there, on some speculative theories To put it in a nutshell, the general rule is, the particular contingency mut occur as specified in the will, else the gift over will lapse. The exception is the rule laid down in *Jones* v *Westcomb*[4] This is implicit in the following observations of Romer, Lord Justice in the case in *Re Fox's Estate Dawes* v *Druth Phoenix Assurance Co. Ltd.* v. *Fox*[1]:

"The principle is applicable, therefore, *only in those cases* where the Court, looking at all the relevant circumstances of the case, including, of course, the will itself,

1 (1937) 4 All E R 664, 669
2 (1948) 2 All E R. 979, 982
3 (1951) 1 All E R 391.
4 1 Eq Cases 245

"comes to the conclusion that *the testator must* a fortiori *have intended* the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect"

I have *italicised* the words "*only in these cases*" and the words "*the testator must a fortiori have intended*" to bring out the general rule and the exception It is unnecessary to refer to other decisions in England

I may now refer to two Bench decisions of this Court on which strong reliance was placed by learned Counsel for the plaintiff The first is the decision in *Official Assignee* v *Vedavalli Thayarammal*[1], In that case the Court had to construe a will and a subsequent codicil of the year 1897 There the testator disinherited his son and bequeathed the whole of his residuary estate to his grandson or grandsons born or to be born to his son within ten years after the testator's death, the will further provided that if no such grandsons were born within the time limit the whole of the estate was to be divided equally between his grand-daughters after the death of the testator's wife By the codicil the distribution of the residuary estate amongst the grand-daughters was postponed till after the death of his wife, his son and daughter-in-law. The testator died in 1897 leaving his widow, son and three grand-daughters and a grandson was born two years later in 1899. The gift in favour of the grandson, though born within ten years of the death of the testator was held invalid as a bequest in favour of an unborn son. It was held that the gift over to the grand-daughters would not take effect as there were grandsons born within ten years (the time limit fixed under the will) It was also held that the case was governed by section 117 of the prior Act and that the prior bequest had not failed in the particular manner as set out in the will Spencer, J., observed that section 117 (corresponding to present section 130), should be construed strictly, and that the condition under which the grand-daughters were to take the estate should be strictly complied with.

The next decision to which reference may be made is the one in *Subramania* v. *Pakkiri*[2]. In that case, the testator bequeathed his properties to his minor son, appointed the testator's sister as the guardian to look after and protect the minor, with a provision that in case, the minor son died, the testator's sister should take and enjoy all his properties. Madhavan Nair, J, held that the intention of the testator was that his sister should take the property only in the event of his sons surviving the testator, taking the properties and then dying and that it was not the intention of the testator that the sister shold be entitled to the properties at the death of the son, whatever may be the point of time. The learned Judge held that section 129 did not apply; but section 130 only applied.

Reference may next be made to the Bench decision of this Court in *Nammalwar* v. *Appavu Udayar*[3], where too, section 130 of the Succession Act was applied In that case, the prior bequest became void as offending the rule in *Tagore case*[4] a contingency not provided for in the will The decision of the Supreme Court in *Mrs. Shirinbai Manekchaw* v. *Nargacebai J Motishaw*[5], was distinguished as turning upon the particular terms of the will. In *Nammalwar* v. *Appavu Udayar*[3] the testator executed a will and a codicil by which he directed that his three wives should after his life time take the *A* and *B* scheduled properties specified in the will for their lives without powers of alienation, that the wives should maintain the daughters, get them married, keep the sons-in-law in the family, and that if any of his daughters should beget male heir all the properties of the testator should belong to that male heir. The will further provided

1. 51 M L J 182: A I R 1926 Mad. 936
2. A.I R. 1935 Mad 119.
3. (1960) 1 M L J. 209: I L.R. (1960) Mad. 35 : A I.R. 1960 Mad. 283.
4. (1872) 9 Beng. L R. 377.
5. (1956) S C J. 704 (1956) 2 M.L J. (S C.) 67: (1956) S.C R 591 : A.I.R. 1956 S.C. 747.

that in case no male heir was born to any of his daughters all the properties of the testator should go to the charity The testator died in 1902 and a grandson through a daughter who was the second defendant in the action was born ten years later in 1912. The bequest in favour of the grandson was invalid in law as being a gift in favour of an unborn child The representatives of the charity brought a suit for a declaration that even though the prior bequest failed for a different reason, the disposition over, took effect under the rule in section 129 of the Succession Act The Bench did not accept this contention but held that section 130 only applied The Bench pointed out that the gifts in favour of the grandson and in favour of the charity were not independent gifts, nor even could be considered as substitutional gifts but that on the terms of the will, the bequest in favour of the charity was clearly a conditional gift.

If the principle of this decision is applied, I have no doubt that the disposition in favour of the Government cannot take effect In my view, there can be no doubt that the condition which is quite apparent on the terms of the will in question, is that the daughter of the testator should survive the widow, enjoy the properties and die issueless That important condition has not been satisfied. If the death of the daughter without issues alone is to prevail, and is sufficient for the gift over to take effect, it will be seen that under the terms of the will, the bequest in favour of the Government should take effect immediately on the death of the daughter, as the will does not provide for any time lag whatsoever, between that date and the disposition over in favour of the Government Under the terms of the will, both the events must synchronise and the will does not provide for any person being entitled to any right over the properties after the death of the daughter except the Government. Here, the situation as provided in the will is totally different, the widow is undoubtedly entitled to enjoy the property till her life time The acceptance of the contention of the Government would be to modify the will and reading into it, a different condition that the disposition over will take effect not only at the death of the daughter without issues, but also on the death of the widow, the Government in the interim period between the death of the daughter and the widow having no right. It will be virtually re-writing the will and providing for two totally different contingencies It is in this connection that reference should be made to the following note of warning of Cockburn, C J , in *Brookman* v. *Smith*[1].

> "Then a state of things arises which I presume was not contemplated. *Are we to force the words of the will, or rather to interpolate new words into it, in order to make it meet this altered and, as I think, in all probability, unforeseen state of things? I think we cannot do that.* If there is anything ambiguous in the will, and from the context you can gather the intention of the testator, it is possible that in such a case you may make the language of the remainder of the will meet what you clearly conceive to be the meaning of the man making it. But I see nothing in that which is expressed, and nothing in the rest of the will which would lead me to suppose that it was intended to provide for this contingency, which it would have been so easy to provide for, which a few words would have made perfectly clear, and which, if it had been present to the mind of the testator, he would have provided for *I do not think that we are to make the words of the will embrace that which they do not embrace, and which I do not think, by implication, they were intended to embrace*"

For all these reasons, I hold that the residuary estate lapsed in favour of the plaintiff, the widow of the testator and under section 14 of the Hindu Succession Act she became the full and absolute owner of the properties.

No costs.

V.S. —— *Order accordingly*

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1. L.R. 7 Exch. 271 at 274.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Sri Bharathi Mills, Pondicherry .. *Appellant**

v.

D. Krishnaswamy .. *Respondent.*

Industrial Disputes—Order of termination of service—If one made in pursuance of contract of service or one of dismissal for misconduct—Determination—Criterion.

French Labour Code (1952), *Article 42—Termination of service in wrongful breach of contract—Damages—Measure of*

The question whether an order of termination of service of a worker is in reality an order in pursuance of the contract of service or one of dismissal for misconduct, is a question of fact to be decided on the facts and circumstances of each case. The form of the order is immaterial What is material is its substance.

The order in the present case though in form is one terminating the contract of service of the worker according to the terms of the contract, is in substance one of dismissal without giving the worker an opportunity to explain the alleged misconduct of negligence of duty, leading to financial loss to the Management (Mills).

Paragraph 14 in Appendix IV of the Chakravarthi Award, which is binding on Textile Mills in Pondicherry, provides that no order of dismissal or suspension as substantive punishment shall be valid unless the employee concerned is informed in writing of the alleged misconduct and is given a reasonable opportunity and time of at least 48 hours' duration to explain the circumstances alleged against him It is clear from the circumstances of this case that the mills really proceeded against the worker on the allegation of habitual negligence in his work, amounting to misconduct. Consequently, when that allegation is followed by the termination of service alleged to be under the terms of the contract of employment, but which is really a case of dismissal for misconduct, the provisions of the Chakaravarthi Award clearly require the holding of an enquiry with opportunity to the worker to show cause. In the above circumstances the Tribunals below were clearly entitled to conclude that this was a case of wrongful breaking of the contract of service with a liability on the part of the Management to pay damages under Article 42 of the French Labour Code

In the present case the quantum of damages payable to the worker under the Article 42 of the French Labour Code had been calculated on the basis of one month's pay for each year of service which is a valid principle recognised in analogous claims under the Indian Industrial Disputes Act It is therefore clear that the Tribunals below have adopted a fair norm for calculating the quantum of damages payable under Article 42.

Appeals against the Judgments of the Tribunal du Premiere Instance, Pondicherry, dated 5th July, 1965 and 7th June, 1965 respectively confirming the judgments of the Tribunal du Travail, Pondicherry, dated 12th November, 1963 respectively

Vedantham Srinivasan, for Appellant in Special Appeal No 316 of 1965 (P).

S. Ramaswami, for Respondent in Special Appeal No 315 of 1967 (P.) and for Appellant in Special Appeal No. 318 of 1967 (P).

The Court delivered the following

JUDGMENT —These two appeals seeking relief by way of cassation arise from the order of the Tribunal of First Instance at Pondicherry before which appeals were filed against the decision of the Labour Court of Pondicherry constituted under the French Labour Code of 1952, to adjudicate upon an individual dispute between

*S A (Labour) Nos. 315 of 1965 and 318 of 1967 (P). 26th March, 1968

one Kichenassamy, formerly Supervisor in the Bharathi Mills, Pondicherry, and the management. The prior facts which are necessary for the disposal of these two appeals are briefly the following:

It is common ground that the Supervisor in question started his service under the Mills as an ordinary worker in 1946 and he had therefore completed in 1962, to which date the present enquiry relates, 16 years' of service He has been promoted to the higher post of Supervisor on 28th May, 1962 On 19th September, 1962 the management issued a notice to him in the following terms.

> "The above instances clearly point out your negligence in the execution of your duty You had been warned enough number of times to do your work properly Nonetheless, there had been no improvement and your negligence and carelessness had caused much financial loss, as well as loss of reputation to the Mill
>
> In the circumstances the management finds your services not suitable and you are hereby given one calendar month's notice from 20th September, 1962 to the effect that your services will stand terminated from 19th October, 1962 The management very much regrets it has to take such a step, but it has been forced to do so to maintain their quality in the market and to preserve its clientele. All dues payable to you will be paid to you on 19th October, 1962, which you are directed to collect from the Central Office
>
> For Sri Bharathi Mills S A.
>
> ....
>
> Managing Director.
> Managing Agents".

In form, in this notice, the management purported to terminate the services of the worker in terms of the contract of service, which provided for such termination after notice. The worker took the stand that this termination in effect was not a termination according to the contract of employment, but was a camouflage for dismissal from service for misconduct and therefore it amounted to a wrongful breaking of the contract of service, giving him a right to claim damages within the meaning of Article 42 of the French Labour Code. The worker thereafter claimed from the management reliefs under five heads : (1) arrears of increment of salary at Rs. 5 per month for 1954 and 1955, (2) arrears of increment of salary of Rs. 8 per month from 1957 to 1962, (3) gratuity, (4) provident fund, and (5) damages for wrongful dismissal in a sum of Rs 43,920.

The Labour Court observed that:

> "Whereas the Manager of the Mill Sri Barathy through his Counsel, declares that the petitioner was dismissed for repeated negligence in the work... ......
>
> Whereas the mill has not executed interim judgment dated the 15th October, 1963, ordering to produce the warnings served to the requesting party and the report of inquiry"

there was room to conclude that the "requesting party" was dismissed without having been the object of warnings for the repeated negligence which are attributed to him and which facts the Labour Court did not find proved. Thereupon, it held that the worker was entitled to payment of gratuity, provident fund, and damages for wrongful termination of the contract of service in a sum of Rs 2,000, calculated at the rate of one month's pay for every year of service. The claim for arrears of increment was rejected

Both the worker as well as the management appealed to the Tribunal of First Instance at Pondicherry That Tribunal confirmed the finding of the Labour Court that the present case involved an "abusive rupture" of the agreement of service and consequently the management was liable to pay the worker damages besides the provident fund and gratuity The claim for arrears of increment was negatived So far as damages were concerned, on account of a more correct

fixation of the salary, the amount was increased to Rs 2,400 from Rs 2,000. Against the above decision of the Appellate Tribunal, relying upon the provisions of Article 207 of the Labour Code, relief by way of cassation is sought before this Court by the management in Special Appeal No. 315 of 1965 and by the worker in Special Appeal No. 318 of 1967.

The question whether the order of termination of service of a worker is in reality an order in pursuance of the contract of service or one of dismissal for misconduct, is a question of fact to be decided on the facts and circumstances of each case. The form of the order is immaterial What is material is its substance. Both the lower Tribunals have come to the conclusion that the termination of the service of the worker in this case is really one of dismissal for misconduct. There was ample justification for this conclusion. The notice terminating the services of the worker starts with a preamble that the management was satisfied that the worker was negligent in the execution of his duty in spite of repeated warnings and that this negligence had caused much financial loss to the Mill and also loss of reputation These imputations made against the worker clearly amount to imputations of misconduct. Read with these imputations, the subsequent order terminating his services could properly be viewed as an order, amounting, in substance, to the punishment of dismissal. I see, therefore, no good reason to differ from the findings of the Tribunals below, that the order, though in form is one terminating the contract of service of the worker according to the terms of the contract, is in substance one of dismissal without giving the worker an opportunity to explain the alleged misconduct of negligence of duty, leading to financial loss to the mill

In the French Labour Code, side by side with a provision for termination of contract of employment of unspecified duration on giving the prescribed notice (Article 38), there is also a provision for compensation by way of damages in the case of wrongful breaking of the contract of service (Article 42). In the case of termination of the contract with notice, Article 30 refers to certain rules for the purpose to be framed by the Chief Officer of the territory, after consulting the Labour Advisory Board. So far as the Textile Mills in Pondicherry are concerned, reference is made to what is known as the Chakravarthi Award which is binding on them. In Appendix IV of the said Award "Standing Orders for employees," paragraph 13 (1) includes among the items of misconduct, "habitual negligence in work or neglect of work." Paragraph 14 of the award provides that no order of dismissal or suspension as substantive punishment shall be valid unless the employee concerned is informed in writing of the alleged misconduct and is given a reasonable opportunity and time of at least 48 hours' duration to explain the circumstances alleged against him It is clear from the circumstances of this case that the Mills really proceeded against the worker on the allegation of habitual negligence in his work, amounting to misconduct Consequently, when that allegation is followed by the termination of service alleged to be under the terms of the contract of employment, but which is really a case of dismissal for misconduct, the provisions of the Chakravathi Award clearly require the holding of an enquiry with opportunity to the worker to show cause In the above circumstances, the Tribunals below were clearly entitled to conclude that this was a case of wrongful breaking of the contract of service with a liability on the part of the management to pay damages under Article 42 of the Code.

Therefore, the main ground urged by the management in Special Appeal No. 315 of 1965 against the direction for payment of damages is without substance and should fail. Learned Counsel appearing for the management referred me to the following decisions. A Bench of this Court in *V. Ramiah* v. *State Bank of India*[1] observed that if the order terminating the service is, in core and substance, a punishment in disciplinary jurisdiction, then the statutory authority would have to act quasi-judicially and it must observe the norms of natural justice The other deci-

1 (1967) 2 M.L.J 519 : (1967) 32 F J R. 339.

sions, namely, *Chartered Bank* v. *Its Employees Union*[1], and *Murugan Mills* v. *Industrial Tribunal*[2], also lay down analogous principles Such a principle has been borne in mind by the Tribunals below when they came to the conclusion, on the facts the case, about the real nature of the termination of the services of the worker in the present case, and that it amounted to a wrongful violation of the contract of service.

So far as the appeal of the worker is concerned, the finding that the worker is not entitled to arrears of increment cannot be seriously assailed, because the Tribunals below have held that there was no evidence to show that the contract of employment provided for increments of the kind mentioned by the worker in his claim. So far as the claim for damages is concerned, the quantum of damages had been calculated on the basis of one month's pay for each year of service, which is a valid principle recognised in analogous claims under the Indian Industrial Disputes Act. *vide* the decision of the Supreme Court in *Anglo-American Tea Trading Co.* v. *Workmen of N. T Estate*[3]. It is clear that the Tribunals below have adopted a fair norm for calculating the quantum of damages That also calls for no interference. Both the appeals are dismissed. No order as to costs

V.K. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P. S KAILASAM.

Mahalakshmi Textile Mills, Pasumalai, Madurai *Petitioner**

v.

The Government of Madras represented by the Secretary to Government, Department of Industries, Labour and Housing, Madras-9. *Respondent.*

Payment of Bonus Act (XXI *of* 1965), *sections* 10 *and* 36—*Exemption under section* 36 *from payment of minimum bonus—Grant or refusal of by Government—Duty to apply its mind and give reasons.*

The provisions of an enactment should be read together giving effect to all of them. Though section 10 of the Payment of Bonus Act requires payment of a minimum bonus of 4 per cent. the Government has power under section 36 of the Act to exempt the operation of section 10 from the payment of minimum bonus having regard to the financial position and other relevant circumstances of any establishment which is unable to pay minimum bonus It is clear that the rights of parties are involved by a decision of the Government under section 36. In such a situation, it is the duty of the Government to consider the financial position and other relevant circumstances of any establishment and come to its conclusions giving reasons for it In the circumstances the contention that the Government has got an absolute discretion to refuse to grant exemption cannot be accepted. It has to exercise its mind, come to its conclusion and pass an order giving reasons therefor

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W P No 892 of 1968, on the file of the High Court, the High Court will be pleased to issue (1) (in W P No. 892 of 1968), a writ of *certiorari* calling for the records relating to the Order of Government of Madras in 152935/Lab. A/2/67-2 I L H, dated 8th February, 1968 and quash the same and (2) (in W P No 893 of 1968) a writ of *mandamus* directing the respondent herein to grant an exemption as prayed for by the petitioner in its application dated 24th November, 1967 for a partial exemption under section 36 of the Payment of Bonus Act, 1965

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1 (1960) 3 S C R. 441 : (1960) 2 L L J 222
2 (1965) 2 S C J 779 : (1966) 1 M L J (S C) 91 : (1966) 1 An W R (S C) 9 : (1965) 2 S C R. 148 : (1965) 1 L L J. 422.
3. (1961) 2 L L J 625

* W.P Nos. 892 and 893 of 1968. 12th August, 1968.

M. K Nambiar for *K K Venugopal* and *L N. V Subramaniam*, for Petitioner.

The Government Pleader, for Respondent

The Court made the following

ORDER —W P. No. 892 of 1968 is filed by Mahalakshmi Textile Mills, Pasumalai, Madurai, for the issue of a writ of *certiorari* calling for the records relating to the order of Government of Madras in 152935/Lab A-2/67/2 I L H, dated 8th February, 1968 declining to exempt the petitioner-Mills from payment of minimum bonus for the year 1965-66 and quashing the said order W P. No. 893 of 1968 is by the same petitioner for the issue of writ of *mandamus* directing the Government of Madras represented by the Secretary, Department of Industries, Labour and Housing to grant the exemption as prayed for by the petitioner in its application dated 24th November, 1967 for a partial exemption under section 36 of the Payment of Bonus Act, 1965 As the two Writ Petitions raise the same question, they will be dealt with together. According to the petitioner-Mills the Mills incurred a loss of Rs. 13,58,788-68 for the year 1965 On 26th September, 1966, the petitioner applied under section 36 of the Payment of Bonus Act for exemption under section 10 of the Act On 30th November, 1966 the company's liability according to the petitioner was Rs. 56,52,000 The Government refused the exemption prayed for on 2nd December, 1966 On 23rd December, 1966 the Government referred the question of bonus for the year 1965-66 to the Industrial Tribunal Against the order of reference, the petitioner has filed W P. No. 625 of 1967 which is pending in this Court On 9th January, 1967, the petitioner applied for exemption and the Government refused to review its order dated 2nd December, 1966 by its order dated 9th February, 1967. The petitioner again applied for exemption for 1966 on 29th August, 1967 and the Government by its order, dated 13th September, 1967 refused to grant exemption. On 9th October, 1967, 1,142 out of 1,173 workmen agreed by settlement to receive 3 per cent. bonus subject to exemption being given by the Government. The petitioner-Mills paid 2 per cent bonus for 1965 and 1966 on 18th October, 1967 and 19th October, 1967 subject to the Government exempting the petitioner from the operation of the provisions of section 10 of the Act. On 24th November, 1967 the petitioner applied to the Government for partial exemption to enable it to pay 3 per cent. bonus for each year. On 31st December, 1967 according to the petitioner the total liability of the Mills was Rs. 60,85,000. In January, 1968 the petitioner paid further 1 per cent. bonus On 8th February, 1968, the Government rejected the application without stating the reasons and the Writ Petition No. 892 of 1968 was filed on 29th February, 1968, against that order. The order dated 8th February, 1968 runs as follows —

> "The Management of the Mahalakshmi Textile Mills Ltd, Pasumalai, is informed that its request for partial exemption under section 36 of the Payment of Bonus Act, 1965 from payment of minimum bonus for the years 1965 and 1966 under the above Act, cannot be complied with"

The attack against this order is that the Government has failed to give reasons for not complying with the request of the petitioner.

Section 10 of the Payment of Bonus Act, 1965 provides that every employer shall be bound to pay to every employee in an accounting year a minimum bonus which shall be four per cent. of the salary or wage earned by the employee during the accounting year whether there are profits in the accounting year or not Section 36 of the Act enables the Government to exempt certain establishment from the operation of all or any of the provisions of the Act The section reads thus.

> "If the appropriate Government having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in the public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette, exempt for such period as may be specified therein and subject to such conditions as it

may think fit to impose such establishment or class of establishment from all or any of the provisions of this Act "

Reading section 10 and section 36 of the Act together, it is clear that the employer is bound to pay minimum bonus of four per cent. of the salary or wage earned by the employee during the accounting year. But the Government has power to exempt the operation of section 10 from the payment of minimum bonus having regard to the financial position and other relevant circumstances of any establishment which is unable to pay minimum bonus. Therefore it would be the duty of the Government to take into account the financial position and other relevant circumstances of the establishment, and come to a conclusion whether the operation of section 10 with regard to that establishment should be stayed or not It was contended on behalf of the Government that the granting of exemption under section 36 of the Act was purely within the discretion of the Government and the petitioner could not complain if it refused to grant exemption, while it might be open to the Labour to question the correctness of the order of the Government granting exemption. I am unable to accept this contention The provisions of an enactment should be read together giving effect to all of them. Though section 10 of the Act requires payment of a minimum bunus of 4 per cent., reading sections 10 and 36 together would make it clear that it is the duty of the Government to have regard to the financial position and other relevant circumstances of an establishment and grant exemption in appropriate cases. It is unnecessary to decide the question whether the exemption should be of the operation of the entire section 10 or whether it would be open to the Government to say that the provision of section 10 would be modified by imposing a payment of bonus of 3 per cent. But it is clear that the rights of parties are involved by a decision of the Government under section 36 of the Act. If it decides to grant exemption from payment of minimum bonus the Labour would be affected adversely and if it refuses to act in deserving cases, the management would be affected. In such a situation, it is the duty of the Government to consider the financial position and other relevant circumstances of any establishment and come to its conclusion giving reasons for it In construing the duty of a Minister in dealing with a complaint by the milk producers and his declining to refer the complaining to a Committee the Court expressed itself as follows in *Padfield* v. *Minister of Agriculture*[1]·

> " If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatsoever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case however the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act of 1958 "

The Court issued a direction requiring the Minister to consider the complaint of the appellants according to law.

The learned Government Pleader submitted that section 36 is analogous to section 29 of the Madras Buildings (Lease and Rent Control) Act, 1960 which enables the Government to exempt any building or class of buildings from the operation of all or any provisions of the Act The Supreme Court in construing the provisions of section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949 which are *in pari materia* with section 29 of the 1960 Act, held in *P J Irani* v *State of Madras*[2], that any individual order of exemption passed by the Government could be the subject of judicial review by the Courts for finding out whether it was discriminatory so as to offend Article 14 of the Constitution, whether the order was made on grounds which were germane or relevant to the policy and purpose of the Act and whether it was not otherwise *mala fide*. The provision granting power to exempt any building or class of buildings from all or any other provisions of the Act under

1 (1968) 1 All E R H L 694 at p 714 M L J (S C) 92 : (1962) 1 S C J. 194 (1962) 2
2 (1962) 1 An W R (S C) 92 : (1962) 1 S C R 169 · A I R. 1961 S C 1731.

the Madras Buildings (Lease and Rent Control) Act is different and is of a general nature. But section 36 of the Payment of Bonus Act makes it necessary for the Government to exercise its power having regard to the financial position and other relevant circumstances of the concerned establishment In the circumstances the contention that the Government has got an absolute discretion to refuse to grant exemption cannot be accepted It has to exercise its mind, come to its conclusion and pass an order giving reasons therefor. The plea of the Government that the agreement entered into by the labourers accepting three per cent. bonus is contrary to section 34 (3) of the Act would not help the Government in declining to give its reasons for its order. It may be that the agreement which is contrary to the provisions of the section will not be binding on the employees. In this case what the petitioner applied for was that subject to the Government granting exemption of the operation of section 10 of the Act, the employees would be willing to accept three per cent. as bonus Whether this is contrary to the provisions of section 34 (3) of the Act or not, the decision of the Government in deciding the question as to whether exemption under section 36 should be granted or not is affected. On a consideration of all the facts in this case, I am satisfied that the Government is bound to exercise its powers conferred under section 36 and pass such order as it thinks fit giving reasons for the same.

The writ petitions are allowed and the order of the Government is quashed The Government will consider the application of the petitioner afresh and proceed according to law. There will be no order as to costs

V K. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

S. Venkataramanaswami Ayyar .. *Appellant**

v.

S. Abdul Wahab .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 7 (2)—Building —Fair rent, not fixed—Agreement between landlord and tenant enhancing rent—Valid— 'Agreed rent'—Rent agreed between the parties.

The provisions of the Rent Control Act do not prohibit the parties from agreeing between themselves and varying the prevailing rent, so long as the fair rent has not been fixed for the premises under the provisions of the Act The Act makes a distinction between a case where the fair rent has been fixed and the one where the fair rent has not been fixed. Section 7 (2) providing for cases where no fair rent has been fixed, does not prohibit any agreement between the parties increasing the rent. What the sub-section prohibits is the receipt by the landlord of any amount as premium or like sum in addition to the agreed rent The expression 'agreed rent' has not been defined in the Act and its ordinary meaning is, rent agreed between the parties, not any unilateral demand to which the tenant has not consented.

Appeal against the Decree of the District Court, Tiruchirappalli, dated 15th February, 1965 in Appeal Suit No r261 oft1964, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 102 of 1964

R Gopalaswami Iyengar and *N. R Natarajan,* for Appellant

K. S. Naidu and *M. Mani Narayanan,* for Respondent

The Court delivered the following

JUDGMENT —This Second Appeal has been filed by the defendant in a suit for recovery of a sum of Rs 2,562-50 as arrears of rent due in respect of the defendant's tenancy of a building

*S A. No. 787 of 1965 20th September, 1968.

The defendant has been a tenant of the building in question, except for two upstairs rooms, for a number of years, running a coffee and meals hotel in the premises It is the common case of the parties that the agreed rent till 8th February, 1960 was Rs 112-50 per month. There is evidence on record that, in the middle of 1959 itself, the plaintiff had been seeking to evict the defendant and had been refusing to receive the rent at the rate of Rs 112-50 per month The plaintiff would have it that it was not his intention to get an enhanced rent, but to secure vacant possession of the building for the purpose of repairs and improvements. It is the plaintiff's case that, on 8th Februay, 1960, there was an agreement between him and the defendant at the intercession of one Natesan Pillai, P W 2, in this case whereunder the defendant agreed to pay rent at the rate of Rs 200 per mensem from 1st of Masi, 1960, that notwithstanding this agreement, the defendant failed to pay the agreed rent of Rs 200 even in the first month and that he sent only a Bank draft for Rs 112-50. The plaintiff returned this draft for Rs. 112-50 sent for Masi 1960, protesting against the conduct of the defendant in sending that amount only. This protest letter has not been produced by the defendant On the refusal of the plaintiff to accept rent at Rs. 112-50 per moth, the defendant paid the rents into the Karur Vysia Bank Ltd., without any reference to the plaintiff For about a year after this rejection we find no correspondence between the parties On the plaintiff issuing a notice in February, 1961, the defendant, along with his reply notice Exhibit A-2, sent a draft for Rs 1,350, being the accumulated rent at Rs. 112 50 per month which had been put into the Bank. The plaintiff accepted this draft for Rs. 1,350 without prejudice to his contention and the defendant continued to send rent at Rs 112-50 per month thereafter The plaintiff accepted the subsequent rents also of course without prejudice to his claim. This suit was instituted on 5th February, 1963, claiming the balance of rent on the basis that the agreed rent was Rs 200 per mensem Proceedings for eviction were also started under the Madras Buildings (Lease and Rent) Control Act, on the basis that there was wilful default in the payment of the balance of rent.

The defendant denied any agreement on 8th February, 1960, to pay rent from 1st Masi, 1960 at the rate of Rs. 200 per mensem He would state that he never agreed to pay rent at Rs 200 per month unequivocally as alleged, and that there was no concluded agreement in this regard, much less a completed contract. There is no denial that there were talks on 8th February, 1960, between the plaintiff and the defendant. Nor is there any denial of the intercession of Natesan Pillai, P.W. 2, in the matter. According to the defendant, he wanted the two upstairs rooms also to be made available to him and his case is that he did not accept to a rent of Rs 200 per month as such without reference to the two upstairs rooms. In the written statement it is stated that the defendant expressly informed the plaintiff that the question of paying enhanced rent will arise only after the tenants occupying the two upstairs rooms vacated and the rooms were given delivery to the defendant. It is the defendant's case that everything was kept in suspense and the plaintiff promised to take suitable steps to have the tenants in the upstairs rooms evicted outside or through Court.

From the records it is seen, and it is the finding of the Courts below, that the plaintiff had asked for arrears of rent prior to 1960 at Rs. 175 per month, but that the matter was settled between the parties on 8th February, 1960, the defendant agreeing to pay, along with the arrears of rent, a further sum of Rs 150 It is the admitted case of the plaintiff that there was an advance of Rs. 500 left with the plaintiff, and that the defendant had paid the arrears of rent due prior to the date of the fresh agreement, together with a sum of Rs. 150 immediately after the agreement on 8th February, 1960 On the plaintiff's side, the plaintiff, besides himself, examined Natesan Pillai as P W 2, and the defendant was the sole witness for the defence Admittedly there was none else present at the time of the agreement The Courts below have concurred in upholding the plaintiff's case of an agreement to pay rent at Rs 200 per month from Masi, 1960 They overruled the legal plea put forward for the defendant that, even if the agreement was established as a fact, the agreement

to pay enhanced rent was void and unenforceable in view of the provisions of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960).

Counsel for the defendant challenges before me the finding of the Courts below as to the agreement between the plaintiff and the defendant to pay rent at Rs. 200 per month. He also contends that the agreement, even if it is true, is void under the provisions of Madras Act (XVIII of 1960)

The finding of the Courts below as to the truth or otherwise of the agreement is essentially a question of fact and the matter is now before me in second appeal. Learned Counsel for the defendant urges that certain essential and important pieces of evidence have not been given consideration, and that their materiality has been ignored. (After discussing the evidence, his Lordship proceeded) In the circumstances, when the Courts below accept the evidence of P Ws 1 and 2 and hold that there was a clear agreement to pay rent at Rs 200 per month, sitting in second appeal, I have to accept the finding The appellate Court concludes the matter thus:

"Taking all the circumstances into consideration, certainly the evidence of P.Ws 1 and 2 is preferable to that of the defendant and the conclusion of the learned District Munsif that the agreement set up by the plaintiff is true, cannot be seriously challenged"

I shall now take up the next question that the agreement entered into on 8th February, 1960, enhancing the then prevailing rent is void in law and, therefore, unenforceable. The contention of learned Counsel for the appellant is that, except under the provisions of the Madras Buildings (Lease and Rent Control) Act, no landlord is entitled to increase the rent, and that, even if the parties voluntarily enter into an agreement to increase the rent, the agreement is unenforceable in law. Reliance is placed on section 7 of Madras Act (XVIII of 1960) and the general scheme of the Act, to protect the unreasonable eviction of tenants and the regulation and control of rents of buildings Admittedly no fair rent has been fixed for the building in question and the relevant provisions are sub-sections (2) and (3) of section 7 of the Act.

"7. (2) Where the fair rent of a building has not been so fixed—

(*a*) the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed rent.

Provided that the landlord may receive, or stipulate for the payment of, an amount not exceeding one month's rent, by way of advance

(*b*) Save as provided in clause (*a*), any sum paid in excess of the agreed rent, whether before or after the date of the commencement of the Act, in consideration of the grant continuance or renewal of the tenancy of the building after the date of such commencement, shall be refunded by the landlord to the person by whom it was paid or, at the option of such person, shall be otherwise adjusted by the landlord.

(3) Any stipulation in contravention of sub-section (2) shall be null and void."

I fail to see how anything in the above sub-sections can invalidate an agreement between a landlord and tenant for a rent different from the then prevailing rent. The fresh agreement need not necessarily be for enhancement of rent. It can equally be for a reduced rent. What sub-section (2) prohibits is the receipt by the landlord of any amount as premium or like sum in addition to the agreed rent. The expression "agreed rent" has not been defined in the Act and its ordinary meaning is, rent agreed between the parties, not any unilateral demand to which the tenant has not consented. The contention of Counsel for the appellant that there can be no fresh agreement for rent after coming into force of the Act, cannot stand, as the Act deals with tenancies commenced before the Act and those which may come into existence after the Act. When a tenant, for the first time after the Act, is inducted into a building, the landlord and tenant, it is not contended, cannot agree for the rent payable for occupation. The Act does not define "rent", but makes a clear

distinction between "rent" and "premium or other like sum" Section 105 of the Transfer of Property Act defines that the price paid or promised in consideration of a lease is called the premium, and that the money, share of crops, service or other thing paid periodically or on specific occasions or to be rendered at such times by the tenant is called the rent. Clause (*b*) of section 7 (2) brings out clearly the meaning of the words "premium" or "other like sum" They are sums paid in excess of the agreed rent in consideration of the grant, continuance or renewal of the tenancy In *Abdul Rahim* v. *State of Madras*[1], Veeraswami, J , points out that "premium" as ordinarily understood is a lump sum payment made outright as price for a lease Referring to the words "other like sum", the learned Judge observes.

> "The question then is whether such an amount is within the scope of "other like sum" The scope of those words has to be understood in the light of the doctrine of *ejusdem generis* Only a sum which has some resemblance to what is comprehended by the word "premium" will come within the scope of the words "other like sum"

In *King* v. *Cadogan*[2], which the learned Judge has cited, Warrington, L J. said ;

> "Now the Legislature in expressing its intention has chosen to use two words—"rent" and "premium"—both of which in connection with leases have perfectly well known legal meanings I need not say anything about the meaning of the word rent, but "premium", as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease"

The question, in fact, is not *res integra* and has been considered at length by Venkataraman, J , in *P. Subbiar* v. *Madurai Sowrashtra Sabha*[3], and again by Sadasivam, J., in *Ranganayaki Ammal* v. *Chockalingam*[4] In *Jamuna Bai* v. *Narayanamurthi*[5], Chandra Reddy, Officiating Chief Justice, and Srinivasachari, J., considered this question and held that, where fair rent has not been fixed, it is open to the parties to come to an agreement with regard to an increase in the rent. The matter was again considered by the Andhra Pradesh High Court in *Aswathanarayanaiah* v. *Sanjeeviah*[6]. Referring to the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), it was held in that case that, subject to what was specifically provided in the Act, the freedom of contract had not been taken away, that what section 6 in that Act stipulated was that in case a fair rent was fixed, the landlord was not permitted to charge an increased rent except as provided in the Act, and that in case the landlord entered into an agreement with the tenant to get an increased rent over and above the fixed rent, such a contract was not enforceable in law However, it was held that, so long as the fair rent was not fixed, the parties were at liberty to enter into a contract as regards the rent. In *P. Subbiar* v. *Madurai Sowrashtra Sabha*[3], Venkataraman, J , refers to these cases of the Andhra Pradesh High Court, and distinguishing the two earlier decisions of this Court in *Moses Pillai* v. *Govindan*[7] and *Venkateswara Rao* v *Mohammad Mohibulla*[8], as not applicable after Act (XXV of 1949) was amended, where the fair rent had not been fixed, upheld the validity of a fresh agreement for enhanced rent. In *Ranganayaki Ammal* v. *Chockalingam*[4], Sadasivam, J , examined at length the nature of "premium" or "other like sum", and, pointing out that there is a clear distinction between "rent" on the one hand and "premium" or "other like sum" on the other, holds that "premium" does not include "rent". The learned Judge observes :

1. I L R (1961) Mad 1243 · (1962) 1 M L J. 272 at 275.
2 L R (1915) 3 K B 485 at 492
3. C R P No 2319 of 1965
4. (1966) 2 M.L J 139 at 141. (1966) M L J (Crl) 570
5 (1958) 2 An W R. 493.
6 (1964) 1 An.W.R 69. A.I.R. 1965 A.P. 33.
7 (1948) 1 M L J 51
8 (1953) 1 M L J 490.

"There is nothing illegal in a landlord asking for higher rent so long as fair rent has not been fixed If the tenant does not agree to pay it, the remedy of the landlord may be only to file a petition for fixation of fair rent."

I am in entire agreement with the learned Judge, Venkataraman, J, in *P Subbiar* v *Madurai Sowrashtra Sabha*[1], and with the learned Judge Sadasivam, J, in *Ranganayaki Ammal* v. *Chockalingam*[2] My attention has not been drawn to any specific provision in Madras Act (XXV of 1949), particularly after its amendment in 1951, or in Madras Act (XVIII of 1960), prohibiting the parties to agree between themselves and vary the prevailing rent, so long as the fair rent has not been fixed for the premises under the provisions of the Act Restrictions on the rights of parties to enter into a contract cannot be imposed purely by implication, particularly when the existence of such rights is not inconsistent with the provisions of the Act The Act makes a distinction between a case where the fair rent has been fixed and the one where the fair rent has not been fixed under the Act Section 5 of the Act provides against an increase of rent, where the fair rent has been fixed Provision for an increase or decrease in the fair rent in certain events is found in that section, and, the language of section 5 being peremptory, any agreement running counter to this section for increase of rent would be unenforceable Similarly, section 6 provides for an increase in the rent when taxes are increased The provision for variation of rent in sections 5 and 6 are, it must be appreciated, such that if the tenant is not willing and agreeable to an increase in accordance with the provisions, the landlord could have the rent revised under the provisions of the Act. Section 7 (1) (*a*) provides for the landlord claiming excess in terms of the provisions of sections 5 and 6 and the only provision which has to be considered where the fair rent has not been fixed is section 7 (2), and this section does not prohibit any agreement between the parties increasing the rent It is needless to point out that any unilateral action of the landlord increasing the rent will not avail him, as, in the absence of an agreement with the tenant, he cannot recover the same in a Court of law.

The Second Appeal fails and is dismissed with costs. No leave.

V S: *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K S VENKATARAMAN.

Achammal and another .. *Appellants**

v.

N. Krishna Naidu .. *Respondent.*

Civil Procedure Code (V of 1908), Order 41, rules 23 and 27—Remand of the suit to the trial Court without proceeding under rule 27—Order of remand, if could be set aside

Under Order 41, rule 23 of the Code of Civil Procedure, before the suit could be remanded to the trial Court, it is necessary for the appellate Court to find that the decree of the trial Court should be set aside Here, the learned District Judge could have proceeded under Order 41, rule 27, and taken additional evidence on the points formulated by him either himself or have the additional evidence taken by the learned District Munsif In any case, the appeal should have been disposed of by him, and therefore, the order of remand has to be set aside The Court-fee paid on the memorandum of appeal will be refunded.

Appeal against the Order of the District Court, Chingleput in A S No. 179 of 1963—O S No. 32 of 1962 on the file of the District Munsif Court of Trivellore.

K. C Jacob, S K. L Ratan and *R Srinivasan*, for Appellants.

C. Vasudevan and *S. T. Ramachandran*, for Respondent.

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1. C R P. No 2319 of 1965. (Crl) 570.
2. (1966) 2 M L J. 139 at 141 : (1966) M.L J.

*A.A.O. No. 88 of 1964. 23rd June, 1967.

The Court delivered the following

JUDGMENT.—The criticisms levelled by the learned District Judge, that the learned District Munsif did not consider the points indicated by the learned District Judge and should have examined Sri Radhakrishnan as a Court witness, will not justify an order of remanded under Order 41, rule 23, Civil Procedure Code It is settled law, at any rate, so far as the Court is concerned, under Order 41, rule 23, that, before the suit could be remanded to the trial Court, it is necessary for the appellate Court to find that the decree of the trial Court should be set aside. (Vide *Balasubramania Iyer* v *Subbiah Thevar*[1]), wherein the earlier decisions are referred to and also *Ahmed Rowther* v *Bathumal Beevi*[2] Examining the case from that point of view, all that can be said about the judgment of the learned District Munsif is that he has not considered some of the aspects indicated by the learned District Judge and, as for the examination of Sri Radhakrishnan as a Court witness, it is, in the last resort, a matter of discretion for the particular Judge. The learned District Munsif thought that he was justified in acting on the materials placed before him and came to the conclusion that the discharge had been proved. When the learned District Judge felt that the other aspects also required consideration and that Sri Radhakrishnan should be examined as a Court witness, he should have proceeded under Order 41, rule 27, and taken additional evidence on the points formulated by him either himself or have the additional evidence taken by the learned District Munsif In any case, the appeal should have been kept on the file of the learned District Judge and should have been disposed of by him, and a remand was not justified

Accordingly, the order of remand is set aside and the learned District Judge is directed to restore A.S No. 119 of 1963 on his file and dispose it of according to law. I do not wish to say anything further about the merits of the case or about the question as to who should have examined Sri Radhakrishnan, whether the plaintiff or the defendants. These points may be agitated before the learned District Judge, and may even become academic if the learned District Judge should think fit to examine Sri Radhakrishnan as a Court witness The District Judge can dispose of the appeal even on the materials available or, if he thinks it necessary, he can take additional evidence under Order 41, rule 27, in which case the parties will be given just opportunity to adduce further evidence which may be necessary The Court-fee paid on the memorandum of appeal here will be refunded † The parties will bear their own costs in this appeal.

V M K. —— *Order of remand set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K S. VENKATARAMAN.

Achammal and another .. *Appellants**

v

N. Krishna Naidu and others (No. 2.) .. *Respondents.*

Madras Court-fees Act (XIV of 1955), *section* 67, *sub-sections* (1) *and* (2)—*Scope—Remand—Court-fee—Sub-section* (1) *to apply to a suit remanded for fresh disposal by the trial Court—Sub-section* (2) *to apply to second appeal filed under section* 96 *of Civil Procedure Code—Sub-section* (2), *if applies to appeal filed under Order* 43, *rule* 1 (u) *of the Civil Procedure Code.*

Section 67 of the Madras Court-fees Act (XIV of 1955) does not provide for refund of Court-fee on the memorandum of appeal filed in the High Court against an order of remand Sub-section (2) of section 67 applies only to a case where a suit is remanded in appeal for fresh disposal by the trial Court

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1 I L R (1964) 2 Mad 586 : (1965) 78 L W. 105 A I R 1965 Mad 417
2. (1960) 1 M.L J 37
* A A.O. Nos. 88 of 1964 and 369 of 1964.

† The portion relating disportion relating to refund of costs was deleted by order dated 1st September, 1967. See (1969) 1 M L J. 127.

1st September, 1967.

Section 67 (2) will apply only to second appeal filed under section 96 of the Civil Procedure Code Though the appeal filed under Order 43, rule 1 (u) of the Civil Procedure Code may be said to be akin to a second appeal, in the matter of refund, of Court-fee, it is not permissible to order refund on the basis of such order There must be an express provision in the fiscal statute granting refund

Appeal against the Order of the District Court, Chingleput in A S No 179 of 1963—O S No 32 of 1962, District Munsif Court, Tiruvallur etc

B Vedantam for *K C Jacob* and *S K Rattan* and *R Srinivasagopalan*, for Appellants in A.A O No 88 of 1964

A V Narayanaswami Iyer, for Appellant in A A.O. No 369 of 1964.

C. Vasudevan and *K S Ramabhadra Iyer*, for Respondents

The Court made the following

ORDER.—C M A No 88 of 1964 was an appeal filed under Order 43, rule 1 (u), Civil Procedure Code, against the order of the learned District Judge of Chingleput in A S No 179 of 1963 on his file, remanding the suit O S. No 32 of 1962 on the file of the District Munsif of Tiruvallur, for fresh disposal By judgment dated 23rd June, 1967, in C M A No 88 of 1964, I held that the order of remand was not justified and directed the District Judge to dispose of the appeal A S. No 179 of 1963, according to law I also gave a direction that the Court-fee paid on the memorandum of appeal in C M A No 88 of 1964* might be refunded The office has now pointed out that there is no provision in section 67 of the Madras Court-fees Act XIV of 1955 for refund of Court-fee under such circumstances A similar order was passed directing refund of Court-fee on the memorandum of appeal in C M A No 369 of 1964 I agree with the office that section 67 does not provide for refund of Court-fee paid on the memorandum of appeal filed in this Court against an order of remand Sub-section (1) of section 67 applies only to a case where a suit is remanded in appeal for fresh disposal by the trial Court and will not apply. It is, therefore, enough to consider sub-section (2) which reads thus

> " Where an appeal is remanded in second appeal or Letters Patent Appeal for a fresh decision by the lower appellate Court, the High Court remanding the appeal may direct the refund to the appellant of the full amount of fee paid on the memorandum of second appeal if the remand is in second appeal, and of the full amount of fee paid on the memorandum of second appeal and the Memorandum of Letters Patent Appeal if the remand is in Letters Patent Appeal "

It will be seen that this provision applies in terms only to a case where the appeal is remanded in second appeal or Letters Patent Appeal for a fresh decision by the lower appellate Court. Here the appeal A S No. 179 of 1963 (similarly the appeal concerned in C M A No. 369 of 1964) was remanded not in second appeal or Letters Patent Appeal but in an appeal filed in this Court under Order 43, rule 1 (u) of the Civil Procedure Code The provision for filing a second appeal in this Court is section 96 of the Civil Procedure Code and the Letters Patent, with leave of the Judge disposing of the second appeal Section 67 (2) will apply only to such cases It is true that the appeal filed under Order 43, rule 1 (u) may be said to be akin to a second appeal, but in matter of refund of Court-fee, it is not permissible to order refund on the basis of such order There must be an express provision in the fiscal statute granting refund. There is no such provision in the case of an appeal filed in this Court under Order 43, rule 1 (u), Civil Procedure Code I may add that the learned Counsel for the appellant in each case was not able to dispute this proposition Accordingly, the direction in each for refund of the Court-fee paid on the memorandum of appeal filed in this Court will be deleted

V.M K ——— *Direction regarding refund of Court-fee deleted.*

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*Since reported in (1969) 1 M L.J 126

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

U. Muthukrishnan .. *Appellant**

v.

Sri Palani and another .. *Respondents.*

Hindu Law—An estate once vested in a heir not divested of it by the fact of his being adopted by another person—Such person, if entitled to a turn in the management of the trust properties after being adopted by his aunt's husband.

An estate once vested under the Hindu Law cannot be divested and therefore an heir, who has inherited any property from the family of his birth, is not subsequently divested of it on his being adopted by another person. When the office of trustee has become vested by descent in more than one person, it is lawful for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. But trusteeship is not divisible property and therefore there can be no question of the defendant who has been adopted by his aunt's husband, being entitled to a turn in management.

Appeal against the decree of the Sub-Court, Kumbakonam in Appeal preferred against the decree of the District Munsif, Valangiman in O.S. No. 14 of 1962.

K. Raja and *B. Santhalingam*, for Appellant.

D. Ramaswami Ayyangar and *R. Krishnamachari*, for Respondents.

The Court delivered the following

JUDGMENT :—The defendant is the appellant. The plaintiffs laid the suit for recovery of the suit properties or in the alternative for joint possession along with the defendant. The properties belonged originally to one Swarnathammal who created a trust on 30th July, 1925, under Exhibit A-1 by which she appointed Srinivasa Pillai and his heirs as trustees. Srinivasa Pillai died in July, 1930. He had three sons, Sabarathnam, who died on 16th November, 1949, Manickavachagam and the present defendant. The plaintiffs are the sons of Sabarathnam. The defendant was adopted to his aunt's husband, Vasudeva, on 20th February, 1950, under Exhibit B-2. The other brother of the defendant, *i.e.*, Manickavachagam, became adopted to his paternal grand-uncle even in 1936 during the lifetime of Srinivasa Pillai. Defendant filed a suit for partition in O.S. No. 13 of 1942 of the properties and in it included the suit properties. Exhibit B-19 is the plaint in that suit and Exhibit B-21 is the preliminary decree. Against the preliminary decree in O.S. No. 13 of 1942, there was an appeal in A.S. No. 56 of 1943 and Exhibit A-30 is the appellate judgment. In the appeal, the suit properties were excluded by consent of parties with liberty to the present defendant to file a fresh suit. Exhibit A-31 is the judgment of the High Court in A.S. No. 512 of 1944 in the same suit against the final decree and this was disposed of on 27th March, 1946.

The defendant put forward a plea of family arrangement in pursuance of which, he alleged, he was made the trustee in respect of the suit properties, as his brother Sabarathnam continued to be the trustee of the other properties, and for this purpose, he depended upon Exhibit A-2, the will dated 12th November, 1949 executed by Sabarathnam in which it is mentioned that the present defendant was to conduct the charities from out of the suit properties. Sabarathnam died on 16th November, 1949. It was thereafter that the defendant was adopted on 20th February, 1950, by his aunt's husband, Vasudeva. The plaintiffs filed the suit claiming that as the defendant had been adopted into another family, he ceased to be entitled to be a trustee in respect of the suit properties. The suit was dismissed by the trial Court. But the appellate Court allowed the appeal and decreed the plaintiff's suit.

* S.A. No. 13 of 1964. 6th September, 1967.

As far as the other family properties are concerned, the defendant had became a divided member even before he was adopted and therefore there is no doubt that in respect of these properties, he would not become divested as a result of his having been adopted by the other family That is the effect of the decision of this Court in *Sri Raja Venkata Narasimha Appa Rao* v *Sri Raja Rangayya Appa Rao and others*[1]. Though the Bombay High Court has taken a different view in *Dattatraya Sakharam* v. *Govind Sambaji*[2], that need not deter us because as far as this Court is concerned, the decision of the Bench of this Court *Raja Venkata Narasimha Appa Rao* v. *Sri Raja Rangayya Appa Rao and others*[1] is binding Even the Bombay High Court has subsequently taken a view in *Mahabaleswara Narayan* v *Subramania Sh varam*[3], a view which is in consonance with the view taken by this Court in *Sri Raja Venkata Narasimha Appa Rao* v. *Sri Raja Rangayya Appa Rao and others*[1]. The Calcutta High Court has always taken the same view though the Calcutta decisions are based on the Dayabagha system of law (See the decisions in *Beharilal Laha* v. *Kailas Chander Laha*[4]). In fact the Calcutta High Court in the decision reported in *Shyamcharan Chattopadhyaya* v. *Sricharan Chattopadhyaya*[5], has referred to the decision of the Bombay High Court in *Dattatraya Sakharam* v *Govind Sambaji*[2], and has dealt with the contention raised before it on the decisions of the Privy Council in *T Raghuraj Chandra* v. *Rani Subhadra Kunwar*[6] and *Dattatraya Sakharam Devi* v. *Govind Sambaji Kulkarni*[2]. It has been explained there that the decision of the Privy Council above referred to cannot be said to have approved of the decision of the Bombay High Court in *Dattatraya Sakharam Devi* v *Govind Sambaji Kulkarni*[2] The Calcutta High Court also referred to the decision in *Moneram Kolita* v. *Kori Kolitar*[7], and came to the conclusion that an estate once vested under the Hindu Law cannot be divested and therefore an heir, who has inherited any property from the family of his birth, is not subsequently divested of it on his being adopted by another person. The Supreme Court in its decision in *Srinivas Krishnarao Kango* v. *Narayanan Devji Kango*[8], has pointed out that the principle of an adopted son divesting an estate already vested in a widow is based on special considerations and that it could not be extended so as to divest collaterals who have succeeded to an estate. The discussion there would show that the Supreme Court is disposed to take the view taken by this Court rather than the view taken by the Bombay High Court. It is therefore clear that in respect of the family properties which the defendant got under the partition, he cannot be divested of them.

The only question that arises for decision is whether the suit properties which are trust properties vested in the defendant and he was divested of them or whether the suit properties vested in him at all. The Court below has come to the conclusion that the family arrangement pleaded by the defendant under which he was allowed to be in possession of the suit properties and to perform the charities has not been proved. So the defendant can succeed only on the basis that he is entitled to continue in possession of the suit properties on the ground that the properties were vested with him and so he cannot be divested of them, or at least that he is entitled to be a joint trustee along with the plaintiffs Under the settlement executed by Swarnathachi, it was Srinivasa Pillai, and his heirs that were to conduct the charities It is not property which the defendant has got either as the sole survivor in the joint family or in partition among the members of the joint family. It cannot therefore be said that the defendant cannot be divested of those properties even if they can be said to have vested in him Such vesting can, if at all, only be along with the plaintiffs, on the basis that they continued to be joint family properties and that therefore he is also entitled to continue as joint trustee along with the plaintiffs. Now after his adoption to his uncle, the defendant has ceased to be a member of Srinivasa Pillai's family. That is a position which is beyond dispute. Therefore, unless it could be said that even before he was adopted by his uncle, the property had vested

1. (1906) I.L.R. 29 Mad. 437 : 16 M.L.J. 178.
2. (1916) I.L.R. 40 Bom 429.
3. (1923) I.L.R. 47 Bom. 542.
4. (1903) 7 Cal.W.N. 121.
5. (1929) I.L.R. 56 Cal. 1135.
6. (1928) L.R. 55 I.A. 139 : 55 M.L.J. 778.
7. (1880) I.L.R 5 Cal. 776.
8. (1954) 1 M.L.J. 630 : (1954) S.C.J. 408 : (1955) 1 S.C.R. 1.

in the defendant as a member of a joint family and therefore he could not be divested of it, the defendant cannot succeed. It is well established that in a joint Hindu family no member can say that it is enlarged by the birth of new members or become smaller as a result of death of any of the members or as a result of one of the members being given in adoption Though a person would have a right in the properties of the joint Hindu family, his right in respect of any particular property does not arise until there is a division in status by that member expressing an unequivocal intention to separate from the rest of the members of the family Of course the defendant in this case has become separated from the rest of the members of the family; but so far as the suit properties are concerned, they have not been divided and after the defendant was adopted to his uncle, he had ceased to be a member of Srinivasa Pillai's family. Therefore, even if the suit properties are termed to be joint family properties, the defendant lost his right on his being adopted to his uncle So, unless the defendant is a member of Srinivasa Pillai's family at the time when the question as to who is to be the trustee in respect of the suit properties is raised, he cannot succeed in establishing his claim to be a trustee in respect of the suit properties. On his adoption, the defendant lost his right to joint trusteeship along with the rest of the members of Srinivasa Pillai's family. The trusteeship is not divisible property and therefore there can be no question of the defendant being entitled to a turn in management Under Hindu Law, when the office of trustee has become vested by descent in more than one person, it is lawful for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence If the parties do not agree, then, if the right to worship carries with it the right to receive offerings, any one of them may sue for a division of the right just as he may sue for partition of the joint family properties and to have periods fixed during which he may exercise the right. Such a right is 'property' liable to partition, and the joint owners are entitled to perform the worship in turn. But if the right to worship does not carry with it the right to receive offerings, a suit for a division of the right does not lie In such a case, the parties are bare managers or trustees, and the debutter property must be managed by them jointly In this case, there can be no question of the defendant being entitled to manage jointly along with the plaintiffs because he has ceased to be a member of Srinivasa Pillai's family on his adoption by his aunt's husband No other question arises. The second appeal is therefore dismissed. The parties will bear their own cost. Leave granted.

V.M.K. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

S. Janardhanan .. *Appellant**

v.

The Additional Commissioner for Workmen's Compensation, Madras and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), *section* 41 (1)—*Interpretation—Strict necessity to replace temporary unqualified persons by qualified persons, in the interests of the organisation, if a "reasonable cause" for the termination of services.*

The expression "*reasonable cause*" occurring in section 44 (1) of the Madras Shops and Establishments Act (XXXVI of 1947) could be construed as a strict necessity to replace temporary unqualified persons by qualified persons, in the interests of the organisation. But the Court has to be convinced that, not merely the employer was satisfied *bona fide* about the necessity for terminating the services, but that the necessity could be termed "reasonable" *ex facie.*

* W.A. No. 49 of 1964. 26th September, 1967.

Appeal under Clause 15, Letters Patent, against the order of Srinivasan, J., in W.P. No. 866 of 1961.

N. G.R. Prasad, for Appellant.

The Government Pleader and *C. Ramakrishnan* and *M S Umapathy*, for Respondents.

The Order of the Court was delivered by

Anantanarayanan, C J—The only point involved to this writ appeal relates to the application of section 41 (1) of the Madras Shops and Establishments Act (XXXVI of 1947) to the facts of the case as appearing in the record. Admittedly, the employer organisation (the Madras State Electricity Board) cannot dispense with the services of even a temporary employee, like the writ appellant though recruited as such, and on the basis of liability to termination of employment, at any time, except within the terms of section 41 (1). That necessarily implies two contingencies which are very clear from the section itself One is that such an employee, whose services are dispensed with is entitled to at least one month's notice or wages in lieu of such notice. The second is that his services ought to be dispensed with, only for a "reasonable cause"

Now, obviously, the question whether in a given case there was such "reasonable cause," or otherwise is a question of fact It cannot be a question of law for, in that event the Legislature would have proceeded further, and enumerated the categories of what would be "reasonable causes" in law, for dispensing with the services of an employee In the present proceeding apart from the temporary nature of the employment, it is established, on the record, that the writ appellant was unqualified, according to the rules of service, when he was entertained as a temporary employee The reason assigned by the employer for the termination of service, is that other qualified persons, who are thereby entitled to preference for employment, became available for recruitment and it became a matter of necessity to employ in the interests of the efficiency of the organisation and the economic conduct of its business For this reason, the policy had to be implemented by the replacement of unqualified persons by qualified persons. The organisation was therefore compelled to dispense with the services of the writ appellant It appears to us that the cause assigned falls entirely within the scope of section 41 (1) of the Act, and must be construed as constituting a "reasonable cause" in terms of that section The learned Judge (Srinivasan, J) was fully justified therefore, in dismissing the writ petition.

Two authorities have been placed before us by the learned Counsel for the writ appellant. The first is the decision of Rajamannar, C J , and Viswanatha Sastri, J., in *Tata Iron and Steel Co , Ltd case*[1]. That was a very different case, of a person whose services were dispensed with by the employer under section 41 (1) and when the question of the existence of a reasonable cause therefor was mooted, the employer then turned round, and said that the employee had been guilty of misconduct. Since there had been no hint of that charge earlier, the learned Judges, naturally, if we may say so, declined to accept such a justification as either true or valid. We may further point out that section 41 (1) itself refers to misconduct, in the latter part of the section, and requires that this must be supported by satisfactory evidence, recorded at an enquiry held for the purpose The decision has no application here and, in the present case, the employer organisation has throughout consistenly pleaded that the cause was a strict necessity to replace temporary unqualified persons by qualified persons, in the interests of the organisation.

The second decision is *Working Journalists of Tamil Nad* v *Tamil Nadu*[2]. That is upon the Industrial Disputes Act, and it would appear to have very little relevance, here. The dicta in that decision have no bearing upon the simple issue with which

1. (1960) 2 L.L.J. 1043.

2. (1959) 2 L L J. 84.

we are now concerned it may be that regulation of the relation between industrial managements and their employees, falls outside the realm of contract, as observed by the learned Judges But the question here is whether section 41 (1) would justify the termination of service, or otherwise. No doubt, this is not merely dependent upon the subjective satisfaction of the employer The Court has to be convinced that, not merely was the employer satisfied *bona fide* about the necessity for terminating the services, but that the necessity could be termed 'reasonable' *ex facie*, in our view, that would have to be looked at mainly from the point of decision, though of course, this does not mean that the organisation is free to act on any cause. Otherwise, it would mean that the test of 'reasonableness' is not that of the person who is required by law to adopt a reasonable attitude, but of some one else. In our view, on the facts here, there can be doubt at all that the termination was not wrongful as the cause was 'reasonable' that is objectively convincing The writ appeal is, therefore, dismissed No order as to costs

V.M K —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .MR. JUSTICE M M ISMAIL

S Thangavelu Pillai . *Appellant**

v.

E. M. Mani and others . *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 100-*D—Order dismissing the application for excusing the delay in filing an application for payment of compensation—Order, if an award so as to attract section* 100-*D.*

Motor Vehicles Act (IV of 1939), *section* 110-*A* (3)*—Constitution of the Motor Accidents Claims Tribunal after the occurrence of the accident—Appellant in the mistaken belief of the existence of old remedy in the civil Court—Appellant's application for excusing the delay, if could be allowed.*

On the question whether the order dismissing the application for excusing the delay in filing an application filed by the appellant for excusing the delay in filing an application for payment of compensation is an award so as to attract the scope of section 100-D of the Motor Vehicles Act, held that, the effect of the dismissal of such application is the rejection of the application for compensation itself and an appeal is competent under section 110-D (*i*).

Held also that, the peculiar circumstances relating to a new forum, namely, the Motor Accidents Claims Tribunal, being introduced the consequencial belief that might be entertained by a person that in relation to an accident occurring earlier the old remedy (*i e* remedy in the civil Court) is still available should have been taken note of and the Tribunal ought to have excused the delay in filing the application

Appeal against the order of the District Court—Motor Accidents Claims Tribunal—West Tanjore in I A No 7 of 1962 in unfiled O.P (Court-fee register No 258 of 1962)

N. S. Srisailam, for Appellant

G Ramaswami and *R. Lakshmanaperumal,* for Respondents

The Court delivered the following

JUDGMENT —This is an appeal against the order dated 11th July, 1962, of the District Judge and Motor Accidents Claims Tribunal, West Thanjavur, Thanjavur, dismissing the application filed by the petitioner appellant herein for excusing the delay in filing an application for payment of compensation With reference to an alleged accident that took place on 6th October, 1960, on 6th October, 1961, the

* A.A.O. No. 55 of 1963. 20th November, 1967

appellant therein instituted a suit for payment of compensation That plaint was returned on 20th November, 1961, for presentation to the proper forum and the appellant herein presented the same to the Motor Accidents Claims Tribunal. Under section 110-A (3) of the Motor Vehicles Act, the period of limitation prescribed for an application for compensation is sixty days and the proviso to that sub-section confers a power on the Tribunal to excuse the delay if it was satisfied that the applicant was prevented by sufficient cause from the making the application in time. The appellant herein, pursuant to this proviso, filed an application for excusing the delay. It is the common case of both sides that the Motor Accidents Claims Tribunal was constituted for the first time by the Rules promulgated on 12th July, 1961, and prior to that the forum for adjudication of any claim for compensation was the civil Court and the period of limitation available in this behalf was one year. According to the appellants, he was not aware of the promulgation of the Rules of the 12th July, 1961, constituting the Tribunal and therefore under the impression that he could approach the civil Court within a period of one year, he presented the plaint on 6th October, 1961 It is on that ground he applied to the Tribunal for excusing the delay. The Tribunal took the view that ignorance of law cannot constitute sufficient cause to enable it to excuse the delay. Hence the present appeal.

Learned Counsel for the respondent took up a preliminary point to the effect that his appeal is not maintainable. It is section 110-D of the Act which provides for an appeal and that section states that any person aggrieved by an award of a Claims Tribunal may prefer an appeal to the High Court. The contention of the learned Counsel is, the order dismissing the application for excusing the delay is not an award so as to attract the scope of section 110-D (1). As a matter of fact, the learned Counsel went to the extent of contending that the main application for payment of compensation has not yet been dismissed because it has not been entertained at all. I am unable to agree with this contention The effect of the dismissal of the application filed by the appellant to excuse the delay is the rejection of the application for compensation itself. Consequently for all practical purposes, it can be taken that the application for compensation itself has been rejected. Therefore, I am of the view that the present appeal is competent under sectiont 110-D (1) of the Act. As a matter of fact, this conclusion is supported by a decision of this Court in *Gopalaswami* v. *Navalgaria*[1] Therefore I overrule the preliminary objection of the learned Counsel for the respondent and hold that the present appeal is maintainable.

Coming to the merits, admittedly, the tribunal was constituted only on 12th July, 1961, and the period of sixty days provided for under section 110-A (3) will commence only from that date. It is quite possible that the appellant thought that relation to an accident that took place prior to the constitution of the tribunal, his remedy in the civil Court remained unaffected by the constitution of the tribunal and the period of limitation prescribed for the purpose of making an application to such a tribunal Under such circumstances, to reject the application of the appellant to excuse the delay on the ground that ignorance of law cannot constitute sufficient cause is to take an unduly narrow and technical view in this behalf. The peculiar circumstances relating to a new forum being introduced after the occurrence of the accident and the consequential belief that might be entertained by a person that in relation to an accident occuring earlier the old remedy is still available should be taken note of This is what the tribunal in this case failed to do I consider that this is a proper case in which the tribunal ought to have exercised its jurisdiction and excused the delay and should have dealt with the application for compensation on merits Accordingly I allow this appeal and set aside the order dated 11th July, 1962, and direct the tribunal to deal with the application for payment of compensation on merits There will be no order as to cost in this appeal.

V M K ——— *Appeal allowed.*

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1. I.L R. (1966) 2 Mad. 182 : A.I.R. 1967 Mad. 403.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M ISMAIL

Doraiswami Reddiar . *Appellant**

v.

Venkatakrishna Reddiar . *Respondent.*

Stamp Act (*II of* 1899)—*Compromise decree in a partition suit—Rights and obligations between the parties, when do they arise—Stamped compromise decree if could be admitted in execution petition.*

The compromise decree in a partition suit provided for the payment of certain amount by the appellant to the respondent within one year's time, time being the essence of the compromise The appellant deposited the said amount one and half years after the stipulated time. The respondent filed Execution Petition for the recovery of interest and cost. The partition decree was stamped only a few months before the deposit of the amount into Court. Will not the partition decree become operative till it is stamped according to the provision of the Stamp Act?

Held that, there is no provision of law in the Stamp Act which compels parties to a document not to act upon or perform the obligations as between them before having it stamped The requirement of stamping and the prohibition of admitting an unstamped document as evidence will be operative only in relation to proceedings before Courts or other officers As between the parties themselves, that too parties to a compromise decree, it becomes operative immediately and the rights and obligations between them spring forth in accordance with the terms of the decree itself. In this case, admittedly the execution petition was filed by the respondent after the document was stamped. Therefore the document itself can be admitted in evidence in the execution petitions for the purpose of deciding the liability of the appellants to pay the interest.

Appeal against the order of the Sub-Court, Chingleput, in E P No. 79 of 1966 in O S. No. 4 of 1961.

R. Sundaravaradhan, for Appellant.

A C. Munuswamy Reddy, for Respondent

The Court delivered the following

JUDGMENT —In O S. No 4 of 1961 on the file of the Court of the Subordinate Judge at Chingleput, a suit for partition, a compromise decree was passed between the parties on 21st January, 1963 Under the terms of the compromise, the respondent was to give up all his claims to the property in suit, but to receive a sum of Rs. 70,000, from the appellants herein. The compromise decree itself stated that a sum of Rs 25,000 had been paid to the respondent on the date of decree and the balance of Rs 45,000 should be paid within one year's time, that is, on or before 21st January, 1964, time being the essence of the compromise A further provision in this behalf was that the said sum of Rs. 45,000 or so much of it as remained unpaid by that time would thereafter carry interest at six per cent per annum This sum of Rs. 45,000 was payable by the appellants herein on or before 21st January, 1964 The amount was actually deposited into Court only on 21st July, 1965 It is under these circumstances the respondent herein filed E P. No. 79 of 1965 for recovery of a sum of Rs 4,122 12 consisting of Rs. 4,050 being interest on Rs. 45,000 from 21st January, 1964, the date on which the amount should have been paid and 21st July, 1965, the date on which the amount was actually deposited into Court, and Rs. 72.12 being execution charges The appellants herein resisted the claim, but the learned

* A A. No. 188 of 1966. 8th April, 1968.

Subordinate Judge of Chingleput by his judgment and order dated 1st April, 1966, overruled the contention of the appellants It is against the judgment and order the appellants have filed the present appeal

Mr. R. Sundaravaradan, learned Counsel for the appellants, put forward two contentions. The first contention is that the decree being a partition decree, it does not become operative till it is stamped according to the provision of the Stamp Act, such stamping having taken place only in February, 1965, the respondent was not entitled to claim interest for any period earlier to that date. The second contention is that in I.A. No. 33 of 1964 the appellants tendered an amount of Rs. 9,000 towards the money payable by the appellants to the respondents and the respondents did not accept the tender and therefore the appellants were entitled to counter interest on the said amount of Rs. 9,000 from the date of the said I.A I shall deal with these two points in that order.

As far as the first point is concerned, learned Counsel specifically concedes that there is no specific provision in the compromise entered into between the parties as to who should pay the stamp duty. However, learned Counsel wants me to imply that there was an agreement between the parties according to which the parties were to bear the stamp in half and half. The further argument is that the respondent herein not having performed his obligation of bearing half the stamp duty, it was not open to him to come to the Court and ask for recovery of interest. As I pointed out already, the compromise decree not having provided for the payment of stamp duty by the respondent, it is not possible to hold that the respondent has failed to perform his part of the obligation under the compromise decree and therefore he cannot claim interest. Before me learned Counsel put forward the argument from a different angle. His contention is that a partition decree, until it is stamped, cannot be admitted in evidence by any court and therefore it cannot be acted upon and consequently the respondent cannot claim interest from any date anterior to the date when the partition decree was stamped. In my opinion, this argument proceeds on a misapprehension. There is no provision of law in the Stamp Act which compels parties to a document not to act upon or perform the obligations as between them before having it stamped The requirement of stamping and the prohibition of admitting an unstamped document as evidence will be operative only in relation to proceedings before Courts or other officers. As between the parties themselves, that too parties to a compromise decree, it becomes operative immediately and the rights and obligations between them spring forth in accordance with the terms of the decree itself In this case, admittedly the execution petition was filed by the respondent after the document was stamped. Therefore the document itself can be admitted in evidence in the execution petition for the purpose of deciding the liability of the appellants to pay the interest. It is not the case of Mr. Sundaravaradan that if a document cannot be admitted in evidence, the Court should ignore or close its eyes to whatever has happened pursuant to the terms of the document prior to the stamping of the document. It may be, so far as the Court is concerned, it can look into the document as a piece of evidence only when it is stamped. But once it has been stamped, it can look into the document for the purpose of finding out the rights and obligations created in favour of and imposed on the parties with reference to the date on which those rights and obligations arise under the terms of the document itself. Hence I reject this contention of the learned Counsel for the appellants.

The second contention is that the appellants tendered a sum of Rs 9,000, but the same was refused by the respondent and therefore the appellants are entitled to counter interest for the said amount. The learned Subordinate Judge in paragraph 8 of his judgment pointed out that no certified copy of I A. No 33 of 1964 in which the said amount was said to have been tendered was produced before him and the circumstances under which the said amount was not received are not known. But the learned Counsel states the Court should have called for the papers in the I.A., and should have decided the question itself However, the learned Counsel specifically

admits that he did not ask the Court to call for the papers and did not lead any further evidence in relation to the said tender or refusal on the part of the respondent. In these circumstances, I do not consider that there is any justification to interfere with the order of the learned Subordinate Judge Further, this argument of the learned Counsel is in a sense self-destructive. Admittedly, I A No 33 of 1964 was filed at a time when the compromise decree was not stamped If the Court cannot look into and take note of anything that has happened prior to the date of stamping, it is too much for the learned Counsel to call upon the Court to take note of his tender prior to the date when the compromise decree was stamped.

Under these circumstances, in my opinion, there are no merits in this appeal and the same is dismissed with costs

V. M. K ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M NATESAN

S Venkataramanaswami Ayyar ... *Petitioner**

v.

S. Abdul Wahab (No (2) .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25—*Revision—Extent of powers—Propriety of order—Wider powers than conferred by section* 115, *Civil Procedure Code—Question of wilful default in payment of arrears—Section* 10 (2) (i)—*Wilful default*—Bona fide *dispute relating to an agreement to pay enhanced rent—Civil litigation—Default, if wilful—Wilful default—Not a pure question of fact.*

A suit for arrears of rent on the basis of an agreement to pay enhanced rent and an application for eviction on the basis of such arrears was tried together by the District Munsif who was also the Rent Controller under the Act. The District Judge before whom the Civil Appeal came up for hearing upheld the agreement and dismissed the appeal filed by the defendant-tenant. The Subordinate Judge before whom the Rent Control Appeal came up for hearing, simply on the factum of the agreement, upheld the order of eviction The revision petition arising in the Rent Control Appeal was withdrawn to the High Court to be heard along with second appeal filed by the defendant tenant. The agreement was sustained in the second appeal.

Held: The petition for eviction of the tenant has to be dismissed in the absence of wilful default in payment of rent.

Though the jurisdiction under section 25 of Madras Act (XVIII of 1960) is revisional and therefore not as wide in scope as appellate jurisdiction, the High Court, in the revisional jurisdiction has to satisfy itself not only as to the legality or regularity of the proceedings or orders before the Courts below but also as to their propriety.

Apart from the fact that the question whether there is wilful default or not is not a pure question of fact, the jurisdiction under section 25 of the Act to examine the propriety of an order necessarily involves the power to canvass the correctness of the order and examine the circumstances in which it has been passed, the propriety of the order being something different from its legality or regularity. The powers under section 25 are wider than those of the High Court in revision under section 115 of the Civil Procedure Code.

To arrive at a finding that the tenant is in wilful default the mere fact that the tenant is in arrears of rent would not be enough and the Court has to consider whether there has been intentional violation of a clear obligation to pay the rent. To find whether the omission to pay rent is intentional, the various attendant circumstances have to be examined, and where what is pleaded by the landlord is a

* C.R.P. No. 563 of 1968. 20th September, 1968.

subsequent agreement to pay enhanced rent, the questions whether there could have been any *bona fide* mistake about the agreement pleaded for enhanced rent and whether there are reasonable grounds for inferring the existence of a *bona fide* dispute in the matter of the enhancement have to be examined.

As it is the state of mind of the tenant, with reference to the default, that has to be found, no direct evidence can be had on the matter, and, if there are circumstances from which the Court can reasonably infer that there was really no intention to withhold deliberately the rents which the tenant knew were due and payable the Court will not infer wilful default

On the facts, there has been a dispute between the parties and it cannot be said that the same is not *bona fide* The question of providing additional accommodation for enhancing the rent was in issue The hesitancy of the landlord to straightaway seek eviction before the Rent Controller itself in a way, confirms the view It is only long after the institution of the suit for arrears of rent and three years after the repudiation and default that the petition for eviction was filed. In the second appeal it has been observed that there was room for honest misunderstanding on both sides (vide (1969) 1 M L.J. 122). The conduct of the landlord in accepting the rent and keeping quiet for a long time confirms the view.

Petition under section 25 (*b*) (1) of the Madras Buildings (Lease and Rent Control) Act praying the High Court to revise the order of the Court of the Subordinate Judge (Principal), Tiruchirapalli (Appellate Authority—Rent Control), dated 31st March, 1965 and passed in C M.A. No. 26 of 1964 (H.R.C O.P. No. 30 of 1963, Rent Controller, Karur)

R. Gopalaswami Ayyangar and *N. R. Natarajan*, for Petitioner.

K. S. Naidu and *M. Mani Narayanan*, for Respondents

The Court delivered the following

JUDGMENT —This Revision Petition is under section 25 of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) and has been withdrawn to this Court for disposal along with S.A. No. 787 of 1965[1] as the two are connected. The second appeal arises out of a suit for recovery of arrears of rent, the claim being based on an agreement by the tenant to the increase of rent from Rs 112 50 to Rs 200 per month from Masi 1960. The tenant contended that there was no concluded contract to increase the rent to Rs 200 per month. The District Munsif, Karur, who is also the Rent Controller under the Act, tried the suit for arrears of rent and the application for eviction of the tenant together, and, by consent of the parties, the evidence recorded in the suit was treated as evidence in the proceedings under the Rent Control Act. Eviction was sought on the basis that the tenant committed wilful default in the payment of rent. The agreement, according to the landlord, was in February 1960, and the tenant had to pay rent at Rs 200 per month from 1st Masi 1960. But even for the very first payment, he sent only a draft for a sum of Rs. 112 50 This was rejected by the landlord. The tenant, without reference to the landlord, proceeded to deposit monthly rents at Rs 112 50 per month in the Karur Vysia Bank Ltd., and, when a notice was issued by the landlord on 20th February, 1961, a year after the alleged first default, he forthwith sent a draft for the rents due till then, Rs 1,350. The landlord states that he accepted the same without prejudice to his contentions For future months the tenant sent rents at the rate of Rs. 112·50 per month and they were also accepted by the landlord without prejudice to his claim. The suit for arrears of rent was instituted on 5th February, 1963, when three years were about to elapse after the repudiation, the arrears being the difference which the landlord claimed that he was entitled to. The petition for eviction was filed long after in August, 1963. The District Munsif, Karur, who decreed the suit, upheld the contention of the landlord that there was wilful default in the payment of rent and ordered eviction as prayed for. The appeal from the order of the Rent Controller was laid by the tenant before the Subordinate Judge, the Appellate authority, and the appeal from the decree for arrears of rent came up before the

1. *Since reported* in (1969) 1 M.L.J. 122.

District Judge, Tiruchirapalli. As the tenant agreed to abide by the decision in the District Court, the Rent Control Appeal was disposed by the learned Subordinate Judge after the decision of the learned District Judge

Notwithstanding the agreement to abide by the decision of the District Court, I find that the question of arrears was argued on the merits over again before the learned Subordinate Judge. The learned Subordinate Judge set before himself for determination in the appeal only the question whether the agreement dated 8th February, 1960 is true and valid He found that the agreement is true and valid. Without further discussion as to the effect of the finding, he dismissed the tenant's appeal before him Here the learned Subordinate Judge has overlooked one crucial aspect for consideration in the appeal before him. The tenant had, no doubt, agreed to abide by the decision of the District Court even in the rent control appeal before the Subordinate Judge Actually, the order of the learned District Judge on the application for transfer of the appeal before him to the Subordinate Judge, to be heard along with the appeal under the Rent Control Act, runs thus:

> " In view of the stand taken by the respondent (tenant) that he is prepared to abide by the decision of this Court in respect of the C M A that is pending before the Sub-Court, it is unnecessary to transfer this appeal to the Sub-Court "

Clearly this does not mean that, if the appeal before the District Court is dismissed, the appeal under the Rent Control Act has also to be dismissed straightaway. The decision in the District Court can only be as to the truth and validity of the agreement and the liability of the tenant to pay the difference in rent claimed as arrears. The learned Subordinate Judge has overlooked that the mere existence of arrears of rent or default in the payment of rent does not *ipso facto* entitle the eviction of the tenant under the Rent Control Act. There must be wilful default in the payment of the rent. The learned Subordinate Judge has failed to address himself to this question and proceeds in the view that, once it is found that the agreement for enhanced rent is true and valid, eviction should follow as a matter of course In the second appeal, the finding of the Courts as to the truth and validity of the agreement has been affirmed by me today [1] But that does not necessarily involve my rejection of the petition under section 25, filed by the tenant from the order of eviction.

Under section 10 of the Act, the Controller can direct a tenant to put his landlord in possession of the building, if the tenant has not paid or tendered the rent due by him in respect of the building, within 15 days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, but subject to the proviso that, if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in section 11, give the tenant a reasonable time, not exceeding 15 days, to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender, the application shall be rejected. It is relevant to refer, in this connection, to section 11 (3) which provides that, where there is any dispute as to the amount of rent to be paid or deposited under sub-section (1)., the Controller or the Appellate Authority, as the case may be, shall, on application made to him either by the tenant or by the landlord, and after making such inquiry as he deemed necessary, determine summarily the rent to be so paid or deposited. Though the Rent Controller has addressed himself to the question whether there is wilful default in the payment of rent, the Appellate Authority, as pointed out above, has not examined that question This question of wilful default was not in issue in the appeal before the learned District Judge and the decision of the learned District Judge in the matter would be relevant and bind the parties in the appeal under the Rent Control Act to the extent to which the decision went and no further. It has, therefore, become necessary to examine this aspect of the question, as, in the absence of any finding as to wilful default on the part of the tenant, no eviction could be ordered.

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1. *Since reported* (1969) 1 M.L.J. 122.

The matter is now before me in revision under section 25 of Madras Act XVIII of 1960. Though the jurisdiction is revisional and therefore not as wide in scope as an appellate jurisdiction, this Court, in this revisional jurisdiction, has to satisfy itself not only as to the legality or regularity of the proceedings or orders before the Courts below but also as to their propriety. Apart from the fact that the question whether there is wilful default or not is not a pure question of fact, the jurisdiction under section 25 of the Act to examine the propriety of an order necessarily involves the power to canvass the correctness of the order and examine the circumstances in which it has been passed, the propriety of the order being something different from its legality or regularity. The powers under section 25 are wider than those of this Court in revision under section 115 Civil Procedure Code

On the finding I have given in the second appeal, it is now concluded that there has been an agreement between the parties as to the enhancement of rent. To arrive at a finding that the tenant is in wilful default, the mere fact that the tenant is in arrears of rent would not be enough and the Court has to consider whether there has been intentional violation of a clear obligation to pay the rent To find whether the omission to pay rent is intentional, the various attendant circumstances have to be examined, and, in a case like the present one, where what is pleaded by the landlord is a subsequent agreement to pay enhanced rent, the questions whether there could have been any *bona fide* mistake about the agreement pleaded for enhanced rent and whether there are reasonable grounds for inferring the existence of a *bona fide* dispute in the matter of the enhancement have to be examined. As it is the state of mind of the tenant, with reference to the default, that has to be found, no direct evidence can be had on the matter, and, if there are circumstances from which the Court can reasonably infer that there was really no intention to withhold deliberately the rents which the tenant knew were due and payable, the Court will not infer wilful default In *Kuppuswamy Iyer* v. *Harinarayanachari*[1], Rajagopala Ayyangar, J., observed :

> "The question whether the default is wilful involves the determination of the state of mind of the tenant and is thus primarily a question of fact. Of course, this has to be gathered from the circumstances, as no direct evidence is possible in regard to this matter. But in considering it one has to take note of the fact that the condition that the default in the payment of rent should be "wilful" has been introduced by way of amendment in the place of a provision which permitted eviction on mere default. Therefore, if there are circumstances from which it can be gathered that there was really no intention deliberately to withhold the payment, I am of the opinion that there cannot be any wilful default which is necessary to constitute a ground for eviction under the Act as now amended In other words, the distinction has to be drawn between more failure to pay and a wilful default in payment"

Now, to examine the circumstances of this case to find whether there has been wilful default in the payment of the difference between the sum of Rs. 200 per month as per the oral agreement on 8th February, 1960 and the then prevailing rent of Rs. 112.50 per mensem. On the finding of the Courts below as to the truth of the agreement which has been accepted here there is default. That from the very beginning there has been a dispute between the parties about the defendant's liability for enhanced rent, is clear from the fact that even immediately after 8th February, 1960 on which date it is found that there was an agreement between the parties, the defendant had not remitted rent at Rs. 200 but only sent a draft for Rs. 112 50 This of course was not accepted. But immediately before, the tenant sent drafts for two sums for the arrears of rent at the rate of Rs 112·50 per month up to Thai 1960 and an extra amount of Rs. 150. The landlord, in his application for eviction, states that the tenant has set up an entirely different tenancy, as if the agreement for payment of rent at the rate of Rs 200 per mensem was not only in respect of the

1. (1956) 69 L.W. 72 at 73.

property in question already under lease but also that the lease included two upstairs rooms in the occupation of others. That there has been really a dispute between the parties about the scope of the terms of the agreement, is manifest from the fact that, notwithstanding the failure of the defendant to send the agreed rent, the plaintiff did not take any action for nearly three years When the third year was about to expire, the landlord files the suit for recovery of arrears of rent in the civil Court and approaches the Rent Controller for eviction of the defendant some months after, after the dispute had been squarely put in issue in the civil suit. We have to bear in mind that originally the rent was Rs. 150 per month and admittedly it was subsequently reduced to Rs 112-50 per mensem The plaintiff's case is that on 8th February, 1960 the defendant agreed to pay rent at Rs 200 per month from Masi 1960 onwards. In his deposition, he would state that the defendant offered to pay rent at Rs 175 per month for the property already leased alone, but that he did not accept the same The plaintiff would state that he never demanded higher rent at any time before 8td February, 1960, and that he wanted a solatium just to accept the enhanced rent of Rs. 200 per month. He admits in his deposition that every time he had been writing about the agreement, the defendant was denying the same About the defendant's case that he wanted the two upstairs rooms also to be given possession, the admission of the landlord is that the defendant wanted the tenants of the two upstairs rooms to vacate and the rooms to be given to him. The plaintiff states that the agreement for payment of rent was concluded even before the defendant wanted these two upstairs rooms. But a reference to the deposition of P W. 2, Natesan Pillai, admittedly the mediator, leaves one with a different impression. According to P.W. 2's version, he first had a discussion in the matter with the defendant, and after settling the matters with the defendant he took the defendant to P W 1. P.W. 2 admits that, when he asked for enhanced rent, the defendant wanted the two upstairs rooms also for his occupation It is the version of P W. 2 that, when the defendant asked for the vacant possession of the upstairs rooms, P.W. 1, said that he would consider it as and when the rooms fell vacant. In the connected second appeal, I have examined the defendants case as to the negotiation's that took place on 8th February, 1960, particularly with reference to the letters, Exhibits A-7 and B-8. The record, examined as a whole, leaves one with the impression that the truth lies mid-way and that there is an exaggerated defence put forward by the defendant It may be that, having set out his terms to P W 2, the defendant was not very articulate in presence of the plaintiff, due to the plaintiff's status But the plea of the defendant is not one of want of mutuality or absence of *consensusad idem* but a wholesale denial of the agreement In the absence of a specific defence in that regard, it was not for the Court to examine any such plea. But the thing is clear that the placing of the defendant in possession of the two upstairs rooms must have played a prominent and important part in the negotiations that took place on 8th February, 1960, and that there was some kind of obligation, whether as a term of the contract for enhancement of the rent or otherwise, for the plaintiff to put the defendant in possession of the two upstairs rooms It is the admitted fact that, even at the time of the suit, the occupants of the upstairs rooms had not surrendered possession of the rooms even to the plaintiff The agreement was admittedly oral, and P W 2 says that, when he settled the terms with the defendant, none else was present The defendant, in his evidence, states that P W 2 suggested to him that he could pay higher rent, if the two upstairs rooms were given to him According to the defendant, he did not give any final consent to P W 2 with regard to the rent P W 1 had stated, in attempting to explain away Exhibit B-8 that he wanted the defendant to take possession of the upstairs rooms on his behalf As pointed out by me in the judgment in the second appeal[1] the language of the letters, Exhibits A-7 and B-8 does not support it, and the defendant, in his deposition, states that P.W 1 asked him to take possession of the rooms for his own benefit and not for the benefit of the plaintiff The following answers elicited from the defendant in cross-examination are significant:

1. *Since reported in* (1969) 1 M.L.J. 122.

"It is not correct to say that Exhibit B-8 is sent to me to help P.W. 1 to get vacant possession of the upstairs rooms for my benefit........ .... It is not correct to say that when the rent was fixed at Rs. 200 per mensem for the suit premises (it was not) for upstairs rooms also."

One thing emerges from the evidence of the parties, oral and documentary, that there has been a dispute between the parties, the defendant contending that the enhanced rent should be considered on delivering of vacant possession of the two upstairs rooms to him by the plaintiff, while the plaintiff took the stand that without any reference to the upstairs rooms the rent was fixed at Rs. 200 per month. In the absence of proper pleas and the limited scope of the second appeal, I have confirmed the findings of the Courts below. But the fact that the civil Court holds that the rent payable right through from Masi 1960 has been enhanced to Rs. 200 per month, cannot, having regard to all the aspects of the case, make the non-payment of arrears of rent a wilful default. There has been a dispute between the parties and it cannot be said that the same is not *bona fide*. The hesitancy of the plaintiff to straightaway seek eviction before the Rent Controller itself, in a way, confirms that view. It is only long after the institution of the suit for arrears of rent and three years after the repudiation and default that the petition for eviction was filed. Here section 11 (3) of the Act has a bearing. It is provided that, where there is any dispute as to the amount of rent to be paid or deposited under sub-section (1), the Controller or the Appellate Authority, as the case may be, shall, on application made to him either by the tenant or by the landlord, and after such inquiry as he deemed necessary, determine summarily the rent to be so paid or deposited. The dispute in this case between the parties set out by the defendant cannot be wholly false and the defence put forward cannot be said to be one just to drag on the proceedings. In the second appeal I have remarked that there is room for honest misunderstanding on both sides The fact that an exaggerated defence has been raised cannot make the existing dispute farcical and frivolous The other question as to the validity of enhancement of the rent by about 80 per cent mooted and decided in the connected second appeal, is not also a flimsy one. There was no additional accommodation and the Court had to consider whether the enhancement of rent was valid under the Rent Control Act Certainly the dispute, both of law and fact, is genuine and it called for careful consideration and adjudication by the civil Court. It must, therefore, be held that the non-payment of the difference in rent will not amount to wilful default, entitling the landlord to an order of eviction.

A point was made that there was default in the payment of the admitted rent of Rs. 112 50 per month After the return of the draft for Rs. 112.50, the defendant had been, without reference to the plaintiff, depositing the rents for a year in the Karur Vysia Bank Ltd. Once a demand was made therefor, the defendant sent the amount accrued without delay. No doubt it was accepted by the plaintiff without prejudice to his contentions and thereafter the defendant continued to send the admitted rent to the plaintiff In his deposition, the plaintiff has stated that the defendant has been fairly regular after the eviction order in the previous eviction petition. He admits, in his deposition, that till the date of his giving evidence there were no arrears at the rate of Rs. 112 50 per month. No doubt, this Court has held that, merely because the rent due for one month had been improperly refused when tendered, it does not mean that the rent for the succeeding month is neither due nor payable and that a duty is cast on the tenant to make payment or tender every month. The present Act prescribes the mode for the deposit of rent and discharge of the tenant's obligation, where the landlord refuses to accept the rent tendered. In the instant case, with reference to the admitted part of the rent, it looks as if the landlord was prepared to waive the prior default, reserving his claim for the balance of rent due The acceptance of the rents paid out of time without prejudice in the context appears to be, without prejudice to claim the difference as for more than two years after the acceptance of the delayed payment, no action for eviction was taken, and in the meanwhile the admitted rent was being received. The non-payment of rent on the due dates in the intervening period after the return

of the first draft for Rs 112.50, cannot, in the circumstances of the case, be held to constitute a wilful default.

It follows that the order of the Rent Controller, confirmed on appeal by the Subordinate Judge, has to be set aside and the petition for eviction dismissed. There will be an order accordingly dismissing the petition for eviction. Of course, this Court is not concerned with any default subsequent to the decision of the civil Court. The Civil Revision Petition is allowed. The parties will bear their respective costs throughout

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. K. VEERASWAMI, *Officiating Chief Justice* AND MR. JUSTICE T. RAMAPRASADA RAO.

Thiruvengadam .. *Appellant**

v.

Muthu Chettiar and another .. *Respondents.*

Rice Milling Industry (Regulation) Act (XXI of 1958), *section* 5—*Grant of permit—Order passed under section* 5—*Whether administrative or* quasi-judicial—*Objection by trustee or worshipper of temple to the grant of licenc to rice mill near temple—Whether such a person is a person aggrieved.*

Constitution of India, Article 226—*Aggrieved person—Meaning of—Court's power to review administrative orders—Failure to give reasons—Effect of—Examination of records by Court.*

Words and phrases—Aggrieved person.

A power can be said to be *quasi-judicial* in character, if it confers authority to decide rights or liabilities which affect parties, and the statute which confers the power also indicates that there is a duty in exercising the power to act *quasi-judicially.* Even where there is authority the exercise of which affects parties, it cannot be taken as a rule that an order made in exercise of such power is necessarily *quasi-judicial* in character. The nature of the order will further depend upon the scheme and intendment of the provisions of the Act which confers the power and which may throw light on the question.

An order made under section 5 of the Rice-Milling Industry (Regulation) Act is administrative in character. The Act is intended to regulate the rice milling industry in the interests of the general public. The Act is essentially a regulatory measure. It is true that in the course of exercising the power to grant a permit the authority vested with the power is enjoined to have regard to the specified matters and for that purpose, an investigation ought to be directed. But beyond that the power to grant permit is not one to decide rights as such.

The question whether an order is *quasi-judicial* or administrative in character arises not with reference to the scope of the power of this Court under Article 226 of the Constitution The power under the Article is not confined to judicial or *quasi-judicial* orders, but it is within its ambit to review even administrative orders, if only to see that they conform to the rule of law and are within the limits of the grant of the relevant powers. The relevancy of the character of the order as *quasi-judicial* is that in the case of such orders they are bound to set out the reasons therefor. That is however not to imply that administrative orders, as a rule are not required to set out reasons There may be cases in which the circumstances may call for setting out reasons. But, in case of failure to do so it may not follow that the orders are necessarily bad. It will be open to the Court to examine the records and satisfy itself whether the authority exercising the power in deciding a matter has reasonably applied its mind to the appropriate statutory provisions and the facts.

* W.A. No. 150 of 1968. 30th July, 1968.

(On the facts, *held*, the licensing authority, in making the impugned order under section 5 has applied its mind to all the relevant matters enjoined by the statutory provision to be taken into account and to the facts relating to them, though of course this does not appear *ex facie* the order).

A person can be said to be aggrieved, if apart from the general interest such person, as a member of the public, may have, he has a particular or special interest in the subject-matter supposed to be wrongly decided (On the facts, held, that the appellant is not a person aggrieved.)

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Kailasam, dated 8th March, 1968 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 898 of 1968 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the order of the 2nd respondent herein made, in G.O. Ms. No 1422, dated 16th November, 1967 and to quash the same.

G. Ramaswamy, for Appellant.

R. G. Rajan, for 1st Respondent.

The Government Pleader, for 2nd Respondent.

The Judgment of the Court was delivered by

Veeraswami, O C.J.—This Appeal arises from an order of Kailasam, J., dismissing *in limine* the petition under Article 226 of the Constitution to quash an order of the State Government, dated 16th November, 1967 granting to the first respondent a permit under section 5 of the Rice Milling Industry (Regulation) Act, 1958, read with the Government of India Notification G S R. 512, dated 22nd April, 1959 for establishing a new rice mill at Enadhi village, Pattukottai Taluk. The first respondent applied for a permit on 8th November, 1966, the site was approved on 10th January, 1967 and it would appear that the Panchayat Union Council gave its permission for granting of a licence on 13th March, 1967. The permit issued to the first respondent prescribed a period within which he should establish the rice mill It is stated that since then the first respondent has put up the construction and installed a mill thereby incurring a heavy expenditure The appellant representing a local temple which is 65 feet removed from the site on which the rice mill is located, raised certain objections which are also supported by some of the villagers who were worshippers. The objections were that the establishment of the rice mill so near the temple would cause inconvenience to the worshippers particularly at the time of the festival Further, if decortication were to be permitted, the vibration emanating would affect the temple building The impugned order of the Government granting the permit is silent about the objections But the preamble to the order shows that the District Revenue Officer's report, dated 31st July, 1967 had been referred before the decision to grant the permit was arrived at Kailasam, J., in dismissing the writ petition *in limine* stated that he did so in view of the decision of this Court in W P. Nos 2132 and 2298 of 1966 Those cases related to rice mill permits, as in the present appeal The learned Judge took the view that an order granting permit was an administrative order and that the petitioners in those cases could not, in any case, be regarded as aggrieved.

Mr. G Ramaswami for the appellant contends that an order under section 5 of the Rice Milling Industry (Regulation) Act, is having regard to the nature of the power, a *quasi-judicial* order and that the appellant being an objector is also a person aggrieved He says that inasmuch as the impugned order of the Government does not *ex facie* show that the objection had been dealt with and does not give reasons for rejecting them, it is as a *quasi-judicial* order, vitiated, which, for that reason, can be removed by this Court by *certiorari*. In support of his contention as to the nature of the power or jurisdiction of the Government under section 5, he has invited our attention to certain decided cases to show whether the power or jurisdiction is *quasi-judicial* in character will depend upon its nature, the manner of its exercise and how it affects the rights of parties. The proposition formulated in that broad manner is unexceptionable. A power can be said to be *quasi-judicial* in character, if it

confers authority to decide rights or liabilities which affect parties, and the statute which confers the power also indicates that there is a duty in exercising the power to act quasi-judicially. *Board of High School* v *Ghanshyam*[1], observes :

> " The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively."

In *Ridge* v. *Baldwin*[2], the second requirement of duty to act judicially was considered to be unnecessary in relation to a question whether the principles of natural justice had not to be followed in making an order under section 191 (4) of the English Police Act. That sub-section specified the grounds on which a constable could be dismissed from service, and, the particular ground on which the dismissal was made, having not been made known to the officer concerned and his explanation asked for the House of Lords was of the view that on account of failure to observe the principles of natural justice, the order was vitiated. Referring to *Ridge* v *Baldwin*[2], the Supreme Court in *Sadhu Singh* v *Delhi Administration*[3], pointed out that the English case did not support the broad proposition that no order of public authority which affected the rights of a person might be made without giving that person an opportunity of making a representation against the proposed order. It seems to us that even where there is authority the exercise of which affects parties, it cannot be taken as a rule that an order made in exercise of such power is necessarily quasi-judicial in character. The nature of the order will further depend upon the scheme and intendment of the provisions of the Act which confers the power and which may throw light on the question.

So far as an order made under section 5 of the Rice Milling Industry (Regulation) Act is concerned, we are of the view that having regard to the provisions of that section and of the Act as a whole, it is administrative in character. The Act is intended to regulate the rice milling industry in the interests of the general public The Act is essentially a regulatory measure. Sub-section (3) of section 5 says that grant of a permit under sub-section (4) is related to the necessity for ensuring adequate supply of rice and sub-section (4) prescribes the procedure for grant of a permit. It specifies a number of matters which ought to be taken into account in granting a permit, and, for that purpose, the Government should cause a full and complete investigation to be made in the prescribed manner. The other provisions of the Act bear on restriction on rice mills, power of inspection returns, penalties, certain offences and delegation of powers We may particularly notice that section 12 which provides for appeals, does not give a right of appeal against an order under section 5 That by itself is not conclusive but on a consideration of these provisions we are clearly of opinion that an order under sub-section (4) of section 5 is in its effect but administrative in character It is true that in the course of exercising the power to grant a permit, the authority vested with the power is enjoined to have regard to the specified matters and for that purpose, an investigation ought to be directed But beyond that the power to grant permit is not one to decide rights as such It is contended by Mr Ramaswami that refusal of a permit may affect fundamental rights, but, in our view, that general consideration does not alter the true character of the power under section 5 (4). It is a regulatory power which is justified by its being reasonable and intended to serve public interest

A few cases which this Court had occasion to decide under the Rice Milling Industry (Regulation) Act have been brought to our notice on that aspect of the question, but on the view we have taken, it does not appear to us to be necessary to refer to them in detail The view we have expressed is however, in conformity with

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1. (1963) 2 S.C J. 509 : A.I.R. 1962 S.C. 1110.
2. (1963) 2 W L.R 935 : (1963) 2 All E.R. 66 : L R. (1964) A C. 40.
3. (1966) 1 S C J. 215 : (1966) M.L J. (Crl) 153 : (1964) 1 S.C.R. 243 : A.I.R. 1966 S.C. 91.

P. L. L. Ramanathan Chettiar v. *Board of Revenue, Madras*[1], and the orders in Writ Appeal No. 195 of 1962 and W.P. No. 43 of 1964—*Lakshmi Ammal* v. *Commissioner of Civil Supplies*[2], left the question open.

The question whether an order is quasi-judicial or administrative in character arises not with reference to the scope of the power of this Court under Article 226 of the Constitution. The power under the Article is not confined to judicial or quasi-judicial orders, but it is within its ambit to review even administrative orders, if only to see that they conform to the rule of law and are within the limits of the grant of the relevant powers. The relevancy of the character of the order as quasi-judicial is that in the case of such orders they are bound to set out the reasons therefor. That is however not to imply that administrative orders, as a rule are not required to set out reasons. There may be cases in which the circumstances may call for setting out reasons. But, in case of failure to do so it may not follow that the orders are necessarily bad. It will be open to the Court to examine the records and satisfy itself whether the authority exercising the power in deciding a matter has reasonably applied its mind to the appropriate statutory provisions and the facts.

In the instant case, on a reference to the record, we are satisfied that the licensing authority, in making the impugned order under section 5 has applied its mind to all the relevant matters enjoined by the statutory provision to be taken into account and to the facts relating to them, though of course this does not appear *ex facie* the order. As we said, the order does refer to the report from the District Revenue Officer. We have looked into that report which has considered the objections from the worshippers and the appellant in relation to the temple, and, suggested that they might be overruled. When this report was referred to in the impugned order there is no reason in the circumstances to think that the Government did so mechanically. What is, however, stated for the appellant is that the District Supply Officer, who actually carried out the investigation contemplated by section 5 (4) and made a report made it appear to the appellant that there was substance in the objections on behalf of the temple, and that, the fact that the report was surprisingly against the temple was brought to the notice of the Government and there is nothing in the impugned order dealing with that aspect. But, the substance of the matter is whether the Government applied its mind to the objections on behalf of the temple and rejected them. That, we are satisfied, they did.

Learned Government Pleader contended that the appellant, in any case, cannot be regarded as an aggrieved person. Though, on the view which we have already expressed, this question does not require to be considered, nevertheless we may briefly express our view. A person can be said to be aggrieved, if apart from the general interest such a person, as a member of the public, may have, he has a particular or special interest in the subject-matter supposed to be wrongly decided. In *S.M. Transport* v. *Raman and Raman*[3], which arose under the provisions of the Madras Motor Vehicles Act, this Court after referring to the observations of Earl of Reading, C.J., in *Rex* v. *Richmond Confirming Authority Ex parte, Howitt*[4], and also *Rex* v. *Groom Ex parte, Cobbold*[5], laid down the true principle in these words:

> "The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered."

We do not see how, in that sense, the appellant can be said to be aggrieved in the matter of grant or refusal of licence to the first respondent under section 5. He purports to be a trustee or worshipper of the temple. He is not a rival applicant for a rice mill permit nor is he the owner of a rice mill, nor, as far as we are able to see, is he interested in the matters specified in section 5 (4) of the Act. It is true the averment is that the running of a rice mill 65 feet away from the temple may cause

1. I.L.R. (1964) 1 Mad. 151 : (1963) 2 M.L.J. 320.
2. I.L.R. (1964) 2 Mad. 869 : (1965) 1 M.L.J. 119.
3. (1961) 2 M.L.J. 127 : I.L.R. (1961) Mad. 110 : A.I.R. 1961 Mad. 180.
4. L.R. (1921) 1 K.B. 248.
5. L.R. (1901) 2 K.B. 157.

inconvenience to the worshipping public and also may affect the temple building. Whether it is so or not, that is not a consequence which is directly connected with or flows from the rice mill licence. The complaint of nuisance, if at all is directed against the running of the rice mill and not the permit itself. The remedy of the appellant, in such a case if it is available is not in respect of the licence and has to be sought in separate proceedings. In our view, the appellant is not a person aggrieved.

The appeal is dismissed with costs. Counsel's fee Rs. 100.

S.V.J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN

The Management of Kodaikanal Motor Union (P.), Ltd., Thenkarai, Periakulam, Madurai District .. *Petitioner**

v.

A. Nallathambi represented by Madurai Motor Labourers' Union Branch, Thenkarai, Periakulam and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Absence of an award or settlement regarding bonus—Claim for bonus if can be enforced by filing a claim petition under section 33-C (2)—Jurisdiction of Labour Court.

Industrial disputes—Dismissal for misconduct—If and when disentitles the worker from claiming bonus—Security deposit—When can be withheld for loss caused by misconduct.

The argument that in the absence of an award by a competent tribunal or a settlement between the management and the workers, the workers cannot enforce a claim for payment of bonus by a claim petition under section 33-C (2) of the Industrial Disputes Act is untenable. The jurisdiction of the Labour Court under section 33-C (2), when a claim for payment of bonus is raised before it, is not confined to its determination only if there is an award or settlement about the bonus. The absence of an award or settlement will not, *per se*, exclude the jurisdiction of the Labour Court to consider the claim for the computation of bonus by the worker. What the Labour Court has to consider, when a claim for bonus is made before it under section 33-C (2) in the absence of an award or settlement, is whether in the light of the particular circumstances in which the claim to bonus is made in the case, the worker's claim could be sustained or not.

It will be entirely out of place for the Labour Court, in proceedings under section 33-C (2) initiated several years after the original order of dismissal of the worker, to embark on an enquiry about the propriety of the order of dismissal or the terms of the order of dismissal, constituting as it were an appellate authority, over the decision of the management.

While it may not be a safe precedent in labour-management relations, to hold that the dismissal of a worker for misconduct, *per se* would disentitle him to payment of bonus for a year when other employees similarly situated but who continued in service had been paid bonus, it will be proper to recognise an exception to this rule in cases where the dismissal has been for misconduct which involved loss or damage to the management. In these excepted cases the management would be entitled to withhold bonus to the worker as a set-off against the loss or damage. It will be then for the worker to prove that in the particular management wherein he is employed there was a practice contrary to the general principles laid down above. In such circumstances it will be for him to adduce evidence about it.

* W.P. No. 4435 of 1965. 14th August, 1968.

The management, however, cannot withhold the security deposit belonging to the worker for loss thus caused unless the management proves satisfactorily that it had a lien on that money for loss caused to it by the worker's misconduct.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Presiding Officer, Labour Court, Madurai in Claim Petition No. 226 of 1964 dated 7th August, 1965 and quash that portion of the order dealing with the question of bonus and return of security deposit.

S. Chellaswamy for Petitioner.

N G R Prasad for 1st Respondent.

J. Kanakaraj, Government Pleader for 3rd Respondent

The Court made the following

ORDER :—This petition is filed by the Management of the Kodaikanal Motor Union (Private) Limited, aggrieved against the order of the second respondent, the Presiding Officer, Labour Court, Madurai, in a claim petition under section 33-C (2) of the Industrial Disputes Act (XIV of 1947) The worker in question, first respondent, who filed the claim petition, was employed as a conductor. It is common ground that he was dismissed from service by the Management on 21st November, 1961 for the reason stated in the order of dismissal (Exhibit M-6) :

"He was dismissed from service as he meddled with the brake tube of the bus MDU. 6590 which caused serious accident and damage to the extent of Rs. 3,000"

The claim of the worker was that during the year 1960-61, the Management had been paying bonus to its employees at the rate of three months' salary. Therefore, notwithstanding that he had been dismissed from service on 21st November, 1961, he was entitled to bonus which in his case came to Rs 135 There was also an amount of Rs. 50 which was in deposit with the Management on his behalf as security and that amount also had to be repaid to him. He also claimed arrears of salary for a certain period and that was disallowed by the Labour Court and there is no challenge now before me about it But the Labour Court, however, found that the Management was liable to pay bonus to the worker, but the amount was fixed at Rs. 121 and also to return the security deposit of Rs 50

Learned Counsel Sri Chellaswami appearing for the Management in this Writ Petition argues that in the absence of any award by a competent Tribunal or a settlement between the Management and the workers, the workers cannot enforce the claim for payment of bonus by a claim petition under section 33-C (2) of the Industrial Disputes Act and that the Labour Court has also no jurisdiction to give a decision about the right to obtain bonus in such a claim petition This argument, however, appears to me to go against the trend of authority, which is inclined to take a wide view of the scope of the enquiry under section 33-C (2) Thus, in *East India Coal Co.* v. *Rameshwar*[1], the Supreme Court has laid down that whereas sub-section (1) of section 33-C is confined to claims arising under an award or settlement or under Chapter V-A, claims which can be entertained under section 33-C (2) "are not so confined to those under an award or settlement or Chapter V-A" No doubt, when there is an award or settlement and the claim under section 33-C (2) is based upon such an award or settlement, the Court dealing with that claim, as has been laid down in several decisions including the decision above cited, has powers unalogous to those of a Court in execution proceedings, and it would be open to the Labour Court to consider the plea of nullity where the award is made without jurisdiction. But these last observations do not mean that the jurisdiction of the Labour Court under section 33-C (2), when a claim for payment of bonus is raised before it, is not confined to its determination only if there is an award or settlement about the bonus, and the Court cannot refuse to give a decision by making a computation when there are ample materials from which the Court could hold, apart from the

1. (1968) 1 L.L.J. 6 at 9.

existence of an actual award or an actual settlement that the worker has a right to be paid bonus. From this point of view, I am of the opinion that the absence of an award or settlement will not, *per se*, exclude the jurisdiction of the Labour Court to consider the claim for the computation of bonus by the worker, and I therefore over-rule this objection of the petitioner in this case.

What the Labour Court has then to consider, when a claim for bonus is made before it under section 33-C (2) in the absence of an award or settlement, is whether in the light of the particular circumstances in which the claim to bonus is made in the case, the worker's claim could be sustained or not. The general principles in regard to the award of bonus have now come to be fairly settled by reason of the successive decisions in Industrial Disputes arising out of claims for bonus on which awards have been passed by Labour Tribunals They relate to the period before the passing of the Payment of Bonus Act These principles have been summarised in the latest book of V. G Row, 'Law Relating to Industrial Disputes' (Third Edition), part II, page 750. The general principle is that all workmen who have had a hand in earning profits of a particular year would be entitled to bonus, and all apprentices should be entitled to bonus especially when apprentices are also specifically included in the definition of the word 'workmen' in the Industrial Disputes Act, 1947. The bonus should be in terms of the basic wages only and it should not include dearness allowance unless there is a custom to so include it or to include any other similar allowance Then comes the issue which is relevant for the circumstances of this case, the issue of dismissal for misconduct of a worker, and whether it would disentitle him to claim bonus This issue has come in for consideration in several awards of Labour Tribunals of which the awards in *Ganesh Flour Mills Co Ltd.* v. *Their Workmen*[1], *Burmah-Shell Oil Co.* v. *Their Employees*[2], and *The Mill Owners Association, Bombay* v. *The Rashtriya Mill Mazdoor Sangh, Bombay*[3], may be mentioned. In the first decision the Labour Appellate Tribunal held that employees dismissed for misconduct would not be entitled to claim bonus for the year. In the second of the above decisions the Labour Appellate Tribunal refused to grant bonus to workers dismissed for misconduct involving financial loss to the company. In the third of the above cited decisions, the Labour Appellate Tribunal was of the opinion that for the reasons given by the All India Industrial Tribunal (Bank Disputes,) known as the Sen Award, bonus would be payable to employees who had been dismissed for misconduct and a provision to the contrary to it in the award should be deleted. V. G. Row's book above referred to at pages 750-51 gives the relevant findings of the Sen Award in this respect in the following terms.

> " As to the second condition, it is pointed out on behalf of the employees that one who is dismissed for misconduct must be regarded as sufficiently punished by the dismissal, and it is contended that he should not again be penalised by forfeiture of the bonus, which may, besides, be in respect of a period within which the misconduct did not take place. Such a contention was upheld in an award made by Mr. P. S. Bakhale, Industrial Tribunal, Bombay (*The Eastern Chemical Company (India), Bombay* v. *Its Workmen*) It is also doubtful how far such a provision actually serves as a deterrant against misconduct when the prospect of dismissal does not serve as such. *There is no doubt, however, that if an employee has defrauded his bank or caused it damage or loss any claims which the bank can legitimately have against him should be set off against any claims* (including a claim to a bonus) *which he may have against the bank* We think that the conditions as to forfeiture of the bonus on account of dismissal for misconduct is a remnant from the days when a bonus was regarded as a sort of reward or *ex gratia* payment, and, therefore, *subject to what we have said above*, we are not in favour of its retention. "(Italics mine)

What would appear from the foregoing is that while it may not be a safe precedent in Labour Management relations, to hold that the dismissal of a worker for misconduct, *per se*, would disentitle him to payment of bonus for a year when other

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1. (1952) 1 L.L.J. 524.
2. (1954) 1 L.L.J. 21.
3. (1950) 2 L.L.J.1247.

employees similarly situated but who continued in service had been paid bonus, it will be proper to recognise an exception to this rule in cases where the dismissal has been for misconduct which involved loss or damage to the Management. In these excepted cases the Management would be entitled to withhold bonus to the worker as a set-off against the loss or damage.

In the present case the order of dismissal passed by the Management on 21st November, 1961, which I have extracted above, states precisely that it was for misconduct which caused loss to the company. The question arises for consideration as to whether the worker not having appealed against the decision or attempted to get the decision reversed in his favour by any of the methods which the statute allows him, could press in proceedings under section 33-C (2) initiated as in this case, more than three years later, for a fresh consideration by the Labour Court of the circumstances which led to his dismissal. The Labour Court, in the present case observed that the worker in question gave evidence that he did not meddle with the brake tube and that he did not know what was spent by the company towards its repairs. Thereupon the Labour Court observed that even if he had meddled with the brake tube, the driver could have averted the accident if he was careful enough when he was driving the bus The Labour Court also referred to the evidence of M.W. 1 that the main duty of the worker in question as a conductor was to issue tickets and collect fare and there was no misconduct in his collections or in his duty as a conductor throughout his service. It appears to me that it will be entirely out of place for the Labour Court, in proceedings under section 33-C (2) initiated several years after the original order of dismissal of the worker, to embark on an enquiry about the propriety of the order of dismissal or the terms of the order of dismissal, constituting as it were an appellate authority over the decision of the Management. In my opinion that would be totally outside the scope of the powers of the Labour Court in a similar case. So far as the present enquiry about the claim to bonus is concerned, the Labour Court ought to have treated the order of the Management passed in 1961 dismissing the worker for misconduct which caused damage to the Management, as having become final and conclusive as between the Management and the Worker.

Next, it appears to have been urged before the Labour Court, that the Management had paid bonus even for workers dismissed for misconduct in prior years The Labour Court observed that the Management had failed to adduce satisfactory evidence to prove that workers dismissed for misconduct were not paid bonus in any year preceding 1960-61. It appears to me that this way of approach to the matter in dispute, involves the placing of the burden of proof on the wrong party. Once it was established that the worker had been dismissed for misconduct, involving loss or damage to the Management, under the general principles referred to earlier mentioned in the Sen Award *prima facie*, the worker would be disentitled to a claim for bonus. It will be for the worker to prove that in the particular management wherein he is employed there was a practice contrary to the general principles laid down In such circumstances it will be for him to adduce evidence about it. The approach of the Labour Court in this case regarding this aspect of the case involves therefore a wrong approach in regard to the burden of proof. In fact, the worker in the course of his evidence in this case has only alleged that "it was incorrect to say that only workers who were working satisfactorily were paid bonus" He has not asserted that the workers dismissed for misconduct, involving loss to the Management, had been paid in earlier years bonus by the Management It appears, therefore, that the decision of the Labour Court in this case that the first respondent is entitled to bonus notwithstanding that the order of the Management terminating his services for misconduct involved loss to the Management and had become final, is not based on correct principles as laid down by the well-known Awards in the case of Industrial Disputes, including the Sen Award dealing with that matter. The order of the Labour Court, therefore, requires to be set aside and a writ of *certiorari* so far questioning the direction regarding payment of bonus has to issue.

With regard to the claim for repayment of the security amount, it is urged by the learned Counsel for the Management that since the order of dismissal involves a finding that the worker had caused loss to the Management, the Management would be entitled to retain the security amount as a set-off against that loss. Here, however, the position is different from the case of bonus. *Prima facie*, the money belongs to the worker and in the normal course he would be entitled to get a refund of it. It was for the Management to prove satisfactorily, when the matter came before the Labour Court in a claim petition under section 33-C (2), that the Management had a lien on that money for loss caused to it by the worker's misconduct. Necessary evidence establishing the link between the worker's conduct and the loss to the Management should have been adduced in the context of the return of the security money For that purpose the observations of the Labour Court relating to the insufficiency of the evidence adduced by the Management on this aspect of the case becomes relevant. The proper analogy for dealing with this aspect of the claim can be deduced from the principles laid down in the Payment of Wages Act, 1936, where the Management seeks to make a deduction against the worker's claim for wages on account of damage or loss caused by the worker to the employer. In such a case, section 10 (1-A) of the said Act states that the Management should give an opportunity to the worker to show cause against the deduction and adduce satisfactory evidence to support this claim. In my opinion that evidence, as found by the Labour Court, is lacking in this case. Therefore, the claim of the worker for repayment of the security deposit amount must be allowed.

There was an argument finally urged by the learned Counsel for the worker, first respondent, that the amounts involved are very small and that this Court, while exercising its discretionary power under Article 226 of the Constitution, should be slow to interfere with the decision of the Labour Court. But a claim was put forward strenuously on behalf of the petitioner that in dealing with the question of bonus in this case, a principle of considerable importance in the consideration of labour management relations is involved and a decision is necessary without dismissing the writ petition as dealing with amounts of no great value. I was inclined to agree with this contention and heard arguments for and against. This is the reason why the matter had to be considered at some length and a decision given as above.

The writ petition is allowed in part as stated above and dismissed in other respects. No order as to costs.

V.K. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR JUSTICE T. RAMAPRASADA RAO.

Adam Ibrahim Sait .. *Petitioner**

v.

K. Simruthmall and another .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), sections 33 (8), 35 (1) and and 40—Suit for declaration that sale deeds executed were meant only as securities for loan of specified sum and for recovery of possession and for accounts—Effect of such suit—Payment of Court-fee—No need for asking for cancellation of sale deed and payment of Court-fee on that basis.

Where a certain document is the very basis of the plaint claim for redemption and accounts, but the prayer is based on the averment that its effect in law, in the light of facts to be established, is something different from what *ex facie* it purports to be, there is no need for asking for cancellation

* C.R.P. No. 173 of 1967 and Appeal No. 805 of 1968. (formerly C.M.P. No. 8450 of 1967 since numbered as appeal. 13th November, 1968.

On facts, held that, having regard to the case of the petitioner, no cancellation at all need be asked for. The petitioner himself admits in the plaint that the two documents were executed as sale deeds But he alleges that they were meant to operate only as mortgages on certain terms in relation to leases and agreements to reconvey. It is, obvious, therefore, that if the sale deeds are cancelled, there will be then no basis for the petitioner's case that they operated only as mortgages and that as such he was entitled to redemption and the relief of accounting. This is not a case where the sale deeds operated as an impediment or obstruction to the relief of possession and accounting. On the other hand, the petitioner has to stand by the transaction but only treating them as mortgages, far from getting them cancelled, which would at once put an end to his case. *Held* the valuation for purposes of Court-fee made by the petitioner was correct

View expressed in C R P. No. 1764 of 1961, overruled.

C.R.P. No 173 *of* 1967.—Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of the Nilgiris at Ootacamund, dated 11th July, 1966 and made in O S No 173 of 1961. (Court-fee check slip).

C.M.P No. 8450 *of* 1967 (*since numbered as Appeal* No. 805 *of* 1968) —Petition, under Order 44, rule 1 of the Code of Civil Procedure to permit the petitioner to appeal *in forma pauperis* in Appeal (S R.No. 4588/67) sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in O.S. No 173 of 1961 (Court-fee check slip).

S. Thiyagaraja Ayyar, for Petitioner

The Additional Government Pleader and *G Viswanathan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami. J.—The petitioner sued for a declaration that the two sale deeds which he had executed in favour of the first defendant were meant only as security for a loan of a specified sum and for recovery of possession of the plaint schedule properties, after taking an account of the receipts from the hypotheca, and setting off these against the considerations for the mortgages and for passing a decree for the surplus receipts The execution of the two documents has been admitted. But the petitioner's case was that they were intended to operate only as securities and there were lease deeds in favour of the first defendant covering the suit properties and agreements to reconvey them to the plaintiff In effect, the suit is one for redemption of a mortgage and for accounts. The Court below considered that the plaint impliedly asked for cancellation of the two sale deeds and directed payment of Court-fee on that basis. It also directed the petitioner to pay Court-fee on the relief for accounting under section 33 (8) read with section 35 on a sum of Rs. 73,000. The plaint had been valued under section 33 (8), that is to say, Court-fee will be payable on one-fourth of the principals secured under the mortgages. The relief of accounting was valued under section 35 (1). The petitioner being aggrieved by the orders of the Court below preferred a revision petition and also a petition to appeal *in forma pauperis*. When the Civil Revision Petition came up before one of us, it was directed to be posted along with the petition to be disposed of by a Bench. This was in view of the petition to file the appeal *in forma pauperis*

In our opinion, the valuation for purposes of Court-fee made by the petitioner was correct The point turns on whether the petitioner should be deemed to have asked for cancellation of the two sale deeds. We are of the view that, having regard to the case of the petitioner, no cancellation at all need be asked for. As we mentioned, the petitioner himself admits in the plaint that the two documents were executed as sale deeds. But he alleges that they were meant to operate only as mortgages on certain terms in relation to leases and agreements to reconvey. It is obvious therefore, that if the sale deeds are cancelled, there will be then no basis for the petitioner's case that they operated only as mortgages and that as such he was entitled

to redemption and the relief on accounting. This is not a case where the sale deeds operated as an impediment or obstruction to the relief of possession and accounting. On the other hand, the petitioner has to stand by the transaction but only treating them as mortgages, far from getting them cancelled, which would at once put an end to his case

Our attention has, however, been invited to an order of Venkatadri, J., in C.R.P No 1764 of 1961 There, a son-in-law executed a sale of immoveable properties in favour of his father-in-law and later sued his brothers-in-law for redemption of the properties covered by the sale deeds as if they were only mortgages and for accounts The learned Judge held that Court-fee was payable as if the suit was one for cancellation of the sale With due respect, we are unable to share that view If the sale in that case is to be cancelled, we fail to see the basis on which the prayer for redemption and for accounts can be maintained. Cancellation will at once entail dismissal of the suit The learned Judge adverted to a number of decided cases in coming to his conclusion, but it seems to us that they were all cases in which, but for cancellation of the documents they would operate as an obstacle to the relief of possession That, as we endeavoured to point out is not the case in the instant case, as indeed in the case before Venkatadri, J Where, therefore, a certain document is the very basis of the plaint claim for redemption and accounts, but the prayer is based on the averment that its effect in law, in the light of facts to be established, is something different from what *ex facie* it purports to be, there is no need for asking for cancellation On that view, the orders of the Court below are set aside, and treating the application to appeal *in forma pauperis* as an appeal and the plaintiff-appellant for the purpose of the appeal as a pauper, allow the appeal. In view of this, the Civil Revision Petition will stand dismissed, but with no costs Since the appeal has succeeded which means the plaint has to be taken on file and proceeded with by the Court below, there need be no formality of payment of Court-fee and refund and therefore, no question of recovery of Court-fee from the petitioner in the appeal will arise. We may add that nothing we have said in our judgment should be construed as an expression of opinion on the merits of the petitioner's case in the plaint.

S.V.J. ——— *Appeal allowed; revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

B. S. Nanda Rao and others .. *Appellants* *

v.

V. M. Lakshmanaswami Mudaliar .. *Respondents.*

Madras Buildings (Lease and Rent) Control Act (XVIII of 1960)—Rules of interpretation——If open to the Court to look into other provisions of the enactment while construing a particular provision

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 2 (2)—Meaning of the expression 'building'—Property demised a cinema house—Provision for payment of rent to the building—Lease deed, if amounts to a composite lease—Tenant if could seek protection under the Act

The question for consideration is whether the property which had been demised by the plaintiff to the defendant is a building as defined in the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) the defendant claiming the protection of statutory tenancy The lease deed sets out that for the purpose of running a cinema, the building etc. had been fixed at a rate of Rs. 200 per month for five years from the date and an advance of Rs. 1,200 paid After providing for the payment of rents and the adjustment of the advance at the close of the lease

* S.A. No. 1544 of 1963. 11th March, 1965.

period, it is covenanted that at the expiry of the lease period the leased property should be surrendered in good repair. The lessors had to carry out the repairs to the building and also whitewash the building once in a year

The Act does not divide the rent, where amenities are provided, into hire for the amenities and rent for the building In the case of composite lease, where a substantial part of the rent goes in hire of machinery and plant, and Act cannot apply, what is thereby leased is not a theatre simpliciter, but a running cinema business with all its accessories The Act controls and regulates only the letting of buildings and not transfer of business concerns and running business, for periods together with the buildings. The question for consideration in each case would be whether what is leased is a theatre building with its normal adjuncts as a building constructed to serve as a theatre, or something more than a building-an equipped cinema house It follows that the property demised in the present case by the plaintiff comes under the control of the Madras Buildings (Lease and Rent Control) Act, 1960, entitling the tenant to seek the protection of the Act against eviction.

The Madras Buildings (Lease and Rent Control) Amendment Act (XI of 1964) which by section 3 provides for the abatement of certain proceedings, is limited in its application and does not apply to the present suit. In the circumstances there is no need to set aside the decree in ejectment which has been passed But the plaintiff-decree-holder will not be entitled during the subsistence of statutory tenancy to evict the tenants, the present appellants, in execution of the decree in ejectment the remedy for eviction having to be in accordance with and under the terms and provisions of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), by appropriate steps under the provisions of the said Act. The decree would be modified accordingly.

It cannot be denied that for the purpose of construing an enactment, it is right to look not only to the provision immediately under construction, but at any others found in connection with it which may throw light upon it, as throwing light upon the meaning of the word building in the Act The guiding line in the interpretation of the Rent Control Act must be that it is intended to confer personal security on a tenant in respect of his home or his business premises. This is provided by prolonging the existing tenancy permitting the tenant to continue in possession under a statutory tenancy. Rents are controlled At the same time, the landlord is protected and the Act provides for his securing a fair return for his investment.

Appeal against the decree of the Subordinate Judge, Vellore, in Appeal Suit No. 424 of 1962, preferred against the decree of the District Munsif of Ranipet in Original Suit No. 302 of 1960

V. Thiyagarajan for *V. Veeraraghavan* and *K S. Subrahmanyam*, for Appellants.

V. V. Raghavan and *D V. Sivagnanam*, for Respondent.

The Court delivered the following

JUDGMENT —The legal representatives of the defendant in a suit in ejectment, who have failed in both the Courts below, are the appellants before me, and the question for consideration in the second appeal is within a narrow compass, namely, whether the property which had been demised by the plaintiff to the defendant is a building as defend in the Madras Buildings (Lease and Rent Control) Act (XVII of 1960) the defendant claiming the protection of statutory tenancy.

The property in question is known as *Murali Talkies*, a cinema theatre, in Arcot in North Arcot District. It was the subject of a demise by the plaintiff to the defedant under a registered lease deed evidenced by Exhibit A-2, dated 1st April, 1955. The lease was for a period of five years and provided for the defendant handing over possession of the demised property on the expiry of the lease on 31st March, 1960. The suit out of which this second appeal arises was filed for possession on

the expiry of the period of lease, claiming in addition an injunction restraining the defendant from carrying on the cinema business in the demised theatre. The Courts below, following the decision in *Rajah Chetty* v *Jegannathadas*[1], and *A. N Shah* v. *Annapurnamma*[2], held that the lease in question was a composite lease which will not attract the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960. In that view ejectment was decreed, the Courts holding that it was unnecessary, in the circumstances, to grant the injunction prayed for.

Mr. V. Thiyagarajan, learned Counsel appearing for the appellants (for convenience sake hereinafter referred to as the *tenant*), contends that the view of the Courts below is unsustainable, that they failed to appreciate that the decisions in question can have no application whatsoever to the demise in this particular case and that the demise was not, as in the cases relied upon, a lease of a building coupled with a hire of cinema equipment to constitute a composite lease.

The lease deed in question is a plain one in Tamil, drafted in simple language. It sets out that for the purpose of running a cinema, the building etc., had been fixed at a rent of Rs. 200 per month, for five years from that date and an advance of Rs. 1,200 paid. After providing for the payment of rents and the adjustment of the advance at the close of the lease period, it is covenanted that at the expiry of the lease period the leased property should be surrendered in good repair. The lessors had to carry out the repairs to the building and also whitewash the building once in a year. At the foot of the document under the heading *particulars of building* the property demised is set out under the boundaries with the door number, giving measurements. After setting out the measurements of the site, it proceeds thus:

"This and within these zinc sheet building, and movables within this."

Then comes the following description of articles:

"Thirty-four good rattan chairs, five condemned chairs, nine sofas, forty-three back-benches, seventy benches, six sofas, sixteen inside light brackets, one central light, eighteen cushion sofas, eleven brackets outside the compound, three cabin lights, two calling bells, electric wiring' switches, cabin room wiring, main boards, all these."

The contention of the learned Counsel for the plaintiff-landlord is that whereas furniture would, under the very definition of a building in the Act be included under the definition of building, the fans, switches and main boards—these articles would not get included in the definition of building in the Act. Learned Counsel argues that as these are also part of the demise, the lease in question must be deemed to be a composite lease, a building plus something, and therefore, the entire demised property is excluded from the protection of the Act. The learned Counsel contends that the rent having been fixed both with reference to the building proper and the articles, the so-called rent in the lease includes hire charges for these articles, and that, therefore, it cannot be said that there is a lease of a building under the Act and that what he paid was rent as understood under the Act. Mr. V. Thiyagarajan, learned Counsel for the tenant, on the contrary, contends that if these fittings like fans, brackets, etc., and the electric installation comprising the wiring, switches, main boards, etc., are to be treated as something alien to the building, taking the building in question out of the category of protected premises, practically every dwelling-house in the city would get decontrolled and the Act would become practically a dead letter. Learned Counsel contends that a popular or fair and common sense meaning should be given to the definition of building in the Act, which is a remedial measure. Learned Counsel further contends that a perusal of the lease deed would show that the lessor would not have thought of demising the building and hiring the articles as independent entities, and that he must have treated these articles also as part of the building *ex abundanti cautela*; lest they should be lost and not accounted for he had detailed them in the property demised, and that there is nothing special about them. It is contended that no building with any pretensions

1. (1949) 2 M.L.J. 694 : A.I.R. 1950 Mad 284. 2 (1958) 2 An.W.R. 447.

could be conceived of in these days which is not provided with electric installations, and the normal installations would be in keeping with the character of the building.

The Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) has been enacted for the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom. The Act does not specifically define what a building is, but section 2 (2) states that:

'Building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes, and includes—

(a) the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut;

(b) any furniture supplied by the landlord for use in such building or hut or part of a building or hut, but does not include a room in a hotel or boarding house;

Landlord is defined as to include the person who is receiving or is entitled to receive the rent of building; and *tenant* means any person by whom or on whose account rent is payable for a building. The definition of building in the Act, as it only purports to include certain things which may in certain contingencies fall outside the definition of building, cannot be stated to be exhaustive of what a building means and one has to fall back upon what one ordinarily understands by the word building. The contention of the learned Counsel for the plaintiff-landlord is that fittings are not included and reference has been made only to furniture and the items in question, which form part of the present demise, would properly come under the category of fittings. It is, therefore, argued that as fittings are not part of the building what is demised is a building plus something else.

I shall first examine whether on the language of the enactment, even in the absence of inclusion of fittings, the items in question would go with the building as an integral part of the building, and then examine the cases above referred to and the other cases cited with reference to the lease in question.

The principles that should guide interpretation in cases of this kind is well settled:

"There are two rules as to the way in which terms and expressions are to be construed when used in an Act of Parliament. The first rule is that generally statutes will *prima facie* be presumed to use the words in their popular sense. This rule was stated by Lord Tenterdson in *Attorney-General* v. *Winstanley*[1].

The words of an Act of Parliament which are not applied to any particular science or art are to be construed 'as they are understood in common language.'

Critical refinements and subtle distinctions are to be avoided, and the obvious and popular meaning of the language should, as a general rule, be followed." (*Craies on Statute Law*, sixth edition, page 162).

The Court will not put a restricted interpretation on the words and withdraw from the operation of the statute, a case which falls both within its scope and the fair sense of its language, as this would be to defeat, not to promote, the object of the Legislature. If possible, and the language permits, the Court should avoid a construction which would sanction a fraudulent evasion of the Act. In *Karani Properties Ltd.* v. *Miss Augustine*[2], which will be referred to in greater detail presently with reference to the West Bengal Rent Control Act, it is observed by the Supreme Court:

"The Act is intended 'to make better provision for the control of rents of premises.' It has defined 'premises' in very wide terms, as pointed out above. Hence it is difficult, if not impossible, to accept the contention that the Legislature intended the provisions of the Act to have a limited application,

1. (1831) 2 D. and Cl. 302, 310.
2. (1957) S.C.J. 177 : (1957) S.C.R. 20 : A.I.R. 1957 S.C. 309, 312.

depending upon the terms which an astute landlord may be able to impose upon his tenants. In order fully to give effect to the provisions of the statute, the Court has to give them the widest application possible within the terms of the statute. Having those considerations in view we do not think that the supply of the amenities aforesaid would make any difference to the application of the Act to the premises in question.".

The definition of premises in the Act in question there ran in these terms :

" 'Premises' means any building or part of a building or any hut or part of a hut let separately and includes—

(*a*) the gardens, grounds and out-houses (if any) appertaining to such building or part of a building or hut or part of a hut;

(*b*) any furniture supplied or any fittings affixed by the landlord for use of the tenant in such building or part of a building or hut or part of a hut; but does not include a room or part of a room or other accommodation in a hotel or lodging house or a stall in a municipal market . ..."

The contention in that case was that premises had been defined to include tenements with special facilities and fittings agreed by the landlord to be supplied to the tenants. With reference to this definition, their Lordships observed at page 311 :

" The definition of " premises " and " hotel or lodging house " between them almost exhaust the whole field covered by the relationship of landlord and tenant, subject, to the exception noted in the definition of " premises."

In the lease deed in question the landlord had agreed to provide not only electric installations but also electric current and other facilities, night guards, lift-men, etc. The tenant had also the use of a number of fans, plug points, besides a basin, a commode, etc. The landlord supplied, without additional charge, electric energy for consumption by the tenant, for the use of lamps, fans, radio, ovens for cooking, etc. The rent fixed was a consolidated sum for all the amenities and services. Dealing with the question whether the term rent in the Act, which was under consideration before their Lordships in the case, included rent on the fittings defined in the Act, their Lordships observed at page 312:

" Hence it must be taken to have been used in its ordinary dictionary meaning. If, as already indicated, the term ' rent ' is comprehensive enough to include all payment agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances, but also of furnishing, electrical installations and other amenities agreed between the parties to be provided by and at the cost of the landlord, the conclusion is irresistible that all that is included in the term 'rent' is within the purview of the Act and the Rent Controller and other authorities had the power to control the same."

A perusal of the judgment of the Supreme Court above referred to would show that no emphasis had been laid on the word *fittings* in the definition of premises in the Act which was under consideration there The question for consideration now is whether by reason of the omission to include *fittings* in the definition of building in the Act now under consideration, the electric installation and accessories have to be excluded from the concept of building under the Act. In the interpretation of statutes, adopting the words of Lord Herschell in *Cox* v. *Hakes*[1], it cannot be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, as throwing light upon the meaning of the word building in the Act now under consideration. I would refer to the provisions in section 3 of the Act, providing for notice of vacancy and for the Government taking over the premises for any of its purposes or for the occupation of any of its officers. Section 3 (5) runs thus:

1. (1890) 15 App. Cas 501, 529.

"If the building is required for any of the purposes or for occupation by any of the officers, specified in sub-section (3) the landlord shall deliver possession of the building and the fixtures and fittings in or on the buildings, in good tenantable repairs and condition, to the authorised officer,............and the Government shall be deemed to be the tenant of the landlord,..... ....the terms of the tenancy being such as may be agreed upon between the landlord and the tenant...... ...."

The Third Proviso to the sub-clause runs thus:

"Provided also that the rent payable shall be the fair rent, if any, fixed for the building under the provisions of this Act; and if no fair rent has been so fixed such reasonable rent as the authorised officer may determine, in such manner as may be prescribed."

Rule 7 of the Rules framed under the Act provides for the fixation of reasonable rent by the authorised officer for the purpose of the proviso above referred to after personally inspecting the premises and he is enjoined to determine the reasonable rent having regard, *inter alia*, to the *common amenities such as water, sanitation, water-taps electric points, fans, stair-case*. This shows that in the concept of building under the Act, electric points and fans do also go in.

It may also be noticed that though, while defining building, fittings were not referred to, sub-clause (5) of section 3 refers to fittings besides the fixtures, and the building with the fixtures and fittings is treated as coming in the purview of the control. Section 4 provides for the fixation of fair rent for residential and non-residential buildings. With reference to non-residential buildings, with which we are concerned in this case, the provisions run thus:

"*Section* 4 (3)—(*a*) The fair rent for any non-residential building shall be at nine per cent gross return per annum on the total cost of such buildings.

(*b*) The total cost referred to in clause (*a*) shall consist of—

(*i*) the cost of construction as calculated according to such rates for such classes of non-residential buildings as may be prescribed less the depreciation at such rates as may be prescribed;

(*i*) the market value of that portion of the site on which the non-residential building is constructed; and shall include such allowances as may be made for considerations of locality in which the non-residential building is situated, features of architectural interest, accessibility to market, nearness to the railway station and such other amenities as may be prescribed and of the purpose for which the non-residential building is used;

Provided that such allowances shall not exceed twenty-five per cent of the cost of construction as calculated in the manner specified in sub-clause ( )."

Now, going to the Rules under the Act, rule 12 provides for the calculation of the cost of construction of non-residential buildings. Rule 13 refers to the amenities for which allowance may be made when calculating the cost of construction of non-residential buildings. The amenities referred to in this rule, in addition to those specified in section 4 (3) include *inter alia* ( ) air-conditioning; (*ii*) lifts; (*iii*) electric fans, (*v*) tube lights; (*v*) number of electric points; (*v*) electric pump for water, and so on. With reference to residential buildings of certain specified classes, first class electric installations excluding tube lights and fans have to be included in the cost of construction itself, the allowances for amenities in the cost of construction under section 4 (2) *inter alia* taking in air-conditioning, tube lights, fans, number of elec ric points, overhead tank and electric pump for water. It must be noted that under the heading *allowances* the reference is to the number of electric points. A minimum number of electric points would, therefore, go in the cost of construction of the building itself and will not be added in the cost of the amenities—extra points being treated as amenities. The Act has placed a ceiling

as to the cost of amenities with a view to discourage landlords from making the rates prohibitive by including all kinds of things as amenities. Equally they would be prevented from not providing the minimum requirements with regard to buildings showing them under the heading of amenities This will be clear when reference is made to Schedule I under the Rules where specification for various classes of residential buildings are given, and sanitation in respect of class 2 building includes minimum essential electrical fittings of ordinary type. Section 4 refers to the total cost of the building, of course, meaning the controlled building. The total cost consists of the cost of construction as well as the cost of amenities. As the cost of amenities, which include fittings and fixtures, forms a constituent of and makes up the total cost of a controlled building, it is a proper inference that a building as contemplated under the Act would include fittings and fixtures of the type referred to as amenities. The Act does not divide the rent, where amenities are provided into hire for the amenities and rent for the building. Landlord has been defined as the person entitled to receive the rent of a building, and the rent fixed under the Act takes into consideration also the amenities provided. Reference in this connection may also be made to section 17 of the Act, which prohibits a landlord from interfering with amenities enjoyed by a tenant on pain of penalties. Section 17 (1) runs thus:—

> " No landlord shall, without just or sufficient cause cut off or withhold any of the amenities enjoyed by the tenant or be in any way responsible for the amenities being cut off or withheld."

And, under the *Explanation* to the section it is provided thus :

> " In this section, the expression ' amenities ' includes supply of water, electricity, passages, staircases, light, lavatories, lifts and conservancy or sanitary services.

The amenities provided by the landlord to the tenant, inclusive of services as contemplated in the *Explanation*, are matters which would come within the cognizance of the Act, and fittings and fixtures, therefore, would form an integral part of a building as defined in the Act.

Though cases under the English Rent Acts, which contemplate division of rent into one portion for the dwelling-house and another for the furniture may not be of any help, a brief reference may be made to the law in England where to prevent abuses by the landlord, an article, which at the beginning of the demise constituted part of the dwelling-house itself, is not included for the purpose of the Act in the category of furniture.

> " Under the Acts nothing (would be) a furniture if, on detachment, it would become so altered as to lose the utility it previoulsy possessed, (and) article, attached to the fabric of the dwelling-house, which would otherwise be furniture, must be regarded as part of the premises (and so not furniture), if they cannot be detached without appreciable damage to or alteration of the fabric or themselves." (*Vide*—The Rent Acts by Megarry, seventh edition, page 125).

> "Articles which at the beginning of the demise constituted part of the dwelling-house such as built-in cup-boards, built in wardrobes, fitted baths, heavy cellar lids kept in position by their own weight, electric immersion heaters, panel electric fires and modern, water heaters and boilers are excluded. Refrigerators which can be moved as loose articles when the electric plug is withdrawn, linoleum and rubber floor covering, electric clocks and curtains are all properly regarded as furniture and it is considered that the same principle applies to electric and gas cookers which are removable." (*Vide*—Woodfall *on Landlord and Tenant*, twenty-sixth edition, volume I, page 1263-1264)."

This is referred to, to point out that a wider meaning may be given to dwelling-houses as taking within its concept articles which would otherwise be furniture. The guiding line in the interpretation of the Rent Control Act must be that it is intended to confer personal security on a tenant in respect of his home or his busines

premises. This is provided by prolonging this existing tenancy permitting the tenant, to continue in possession under a statutory tenancy. Rents are controllerd. At the same time, the landlord is protected and the Act provides for his securing a fair return for his investment.

I shall now take up for consideration the case law that has been placed before me. Reference has already been made to the decision of the Supreme Court in *Karnani Properties Limited* v. *Miss Augustine*[1]. In my view that settles the question for decision in this case, and in the light of the principles enunciated therein, the lease, in question, cannot be considered to be outside the scope of the Act now under consideration before me. Considerable reliance was placed by Mr. V. V. Raghavan, learned Counsel for the respondent-landlord, on the decision of this Court in *Raja Chetty* v. *Jagannathadas*[2]. The definition of building then under consideration was the same as in the present Act. That was also a case of lease of a cinema theatre, *viz.*, the Maharani Talkies, Madras. The lease therein, was not merely of the theatre, but also of the fixtures, fitting, cinematograph talkie equipment, machinery, furniture, scenery, and things in, upon and about the said theatre as inventoried. The rent had been split up into Rs. 1,600 for the ground and superstructure, and Rs. 800 as hire for the furniture and Rs. 800 as hire for talkies equipment, machinery, fittings and lessor's fixtures. The lessors applied under the Rent Control Act for eviction, and considering the composite nature of the demise, prayed in their petition for eviction of the lessees from the land and buildings, only. It was conceded that if the lessee paid the rents due for the theatre, but defaulted in the payment of what was due as hire for the furniture and equipment, the lessors had no right to ask for eviction under this Rent Control Act. It was in those circumstances that this Court held that the attempt at division of the lease and separation of rights in regard to two classes of property was in the highest degree artificial and not contemplated by the parties. The lease was regarded as a composite lease and as the Act contemplated only letting of residential and non-residential buildings, this Court concluded that the lessor's application for eviction under the Act was not maintainable. It will be noted that hire charges for the machinery and cinema equipment were a substantial part of the total rent fixed and what was let was a running cinema concern. The following observations bring out the distinction and the essential features in that case, which took the lease in question out of the Rent Control Act :

> " Here is a lease of a talkie house with everything that is necessary to run cinema shows. To split up such a composite lease as this into separate contracts of lease and hire is to destroy it altogether (page 287)"

Their Lordships followed in that case an earlier unreported decision of this Court in Appeal Suit No. 590 of 1945, by Patanjali Sastri and Bell JJ In the latter case, their Lordships were dealing with the lease of a factory called the West Coast Match Company. The appeal before their Lordships arose out of a suit for recovery of possession of the factory and the substantial question for consideration was whether the landlord was prevented by the Rent Control Orders then in force from seeking eviction outside the Act. Their Lordships pointed out that the parties knew that they were not dealing with buildings, merely, but with a match factory, namely, a place where the business of manufacturing matches was carried on. Their Lordships observed :

> " Both parties knew that what was let was, as stated, something more than non-residential or residential buildings, something which comprised both, plus such things as are necessary to constitute a match factory, that is to say, a place where matches were made and, in the contemplation of the parties, were going to be made by the lessee for a period of five years from the date of the lease."

" Their Lordships ruled out the argument that the plant machinery and other movables would come under the category of furniture. It is apparent that what

1. (1957) S.C.J. 177 : (1957) S.C.R. 20 : A.I.R. 1957 S.C. 309.
2. (1949) 2 M.L.J. 694 : A.I.R. 1950 Mad. 284.

was let in that case was a factory as a going concern and it was in those circumstances that this Court held that the Rent Control Order did not apply to the case.

Learned Counsel for the landlord placed reliance on the decision of a division Bench of the Andhra High Court in *A N Shah* v. *Annapurnamma*[1]. That was also a case of a cinema theatre and the lease document in case that was considered more or less similar to the one that was considered by this Court in *Raja Chetty* v. *Jagannadha Das*[2]. By the lease in question before the Andhra High Court, cinema equipment was also granted on lease apart from the premises. In the circumstances, that case also cannot help the landlord in this case. Learned Counsel drew my attention to the observations in *A. N. Shah* v. *Annapurnamma*[1], where the Court pointed out that the definition of building under the Madras Rent Control Act included only furniture and not fittings as in the Calcutta case which was under consideration before the Supreme Court in *Karnani Properties, Limited* v *Miss Augustine*[3]. Learned Counsel pointed out that subsequently the Andhra Act has been amended to include fittings also Apart from the fact that I do not find any emphasis placed by the Supreme Court on the inclusion of the word *fittings in* the Calcutta Act, in the view I have taken of the proper interpretation to be given to the word *building* with reference to the lease deed now under consideration before me, the absence of the word *fittings* in the definition of building in the Madras Act is not of much significance. Learned Counsel for the landlord drew my attention also to the decision of Rajamannar, C J, in the *Indian Insurance and B. C. Limited* v. *Paramasiva Mudaliar*[4], where the purchaser in execution of a mortgage decree was held not entitled to the chairs, benches, projectors, etc., of the cinema theatre, which was the subject-matter of the mortgage. The mortgage-purchaser claimed that he would at least be entitled to certain ceiling boards, ceiling fans, exhaust fans and the entire electric installation. The mortgage was of a cinema theatre building which was being built This Court, having regard to the description of the mortgaged property, held that what was intended to be hypothecated was only the building as such and in that view ceiling boards and ceiling fans and exhaust fans would not form an integral part of the building, though they may be required to run the cinema in the building. As regards the electric installation, this Court made a distinction between the electric fittings which are removable and the electric installations consisting of the mains, switch board and the connecting wires between the mains of the building and the mains of the electric supply. These latter, it was held, would form an integral part of the house and were intended to go along with the house So also the general electric wiring in the building but not the fans, shades, bulbs and similar fittings. I do not think that this case will be of much help to the landlord in this case. The conclusion depended on the interpretation of what passed under the mortgage in question is not of general application

Learned Counsel for the landlord then referred to the decision of Ramachandra Ayyar, C J, repored in *Chakravarthy* v. *Union of India*[5] That was a case under section 4 providing for fixation of fair rent under the Madras Buildings (Lease and Rent Control) Act, 1960. The attempt in that case was to include in the cost of construction of the building certain additions and not treat them as amenities, for which allowance could be claimed, the allowance being limited to ten per cent. of the cost of construction of the building. This Court observed that air-conditioning apparatus, tube lights, electric points, etc, would be amenities and it was pointed out that the policy of the Legislature appeared to be that the landlord should not be allowed to increase the rent for the buildings by providing too many costly amenities and thereby inflate the rent It was observed that the list of amenities provided in the section is by no means exhaustive and that electric points, etc., can only be regarded as amenities I fail to see how this decision can help the appellant. As already stated, even treating the item in question in the present case as amenities, they could still form part of the building and come under the purview of the Rent Control Act.

1 (1958) 2 An W.R 447.
2. (1949) 2 M L J 694 A I.R. 1950 Mad 284
3. (1957) S.C.J 177 : (1957) S.C.R. 20 : A I.R 1957 S C 309.
4 (1957) 70 L W 205
5 (1965) 1 M L.J 154 I L R (1965) 1 Mad 372.

By providing that for the purpose of section 4 certain items shall be treated as amenities they do not cease to be an integral part of the building and take the lease of the building with the amenities outside the ambit of the Act The moment it is conceded that these items are amenities under the Act, the applicability of the Act to the building to which they are attached is automatically attracted. Learned Counsel for the appellant also referred to a decision of Rajagopala Ayyangar, J., in *Krishnaveni Ammal* v *Board of Revenue, Madras*[1], wherein it is observed thus:

> "A composite lease which comprises not merely a building and site but also other machinery and equipments like a cinematographic projector, etc., will be outside the scope of the Madras Buildings (Lease and Rent Control) Act, 1949. But a lessee of a theatre simpliciter, who will be entitled to the protection of the Act, will be in lawful possession of the theatre within the meaning of rule 13 of the Madras Cinemas Regulation Rules as his continuance in possession of the premises even after the expiry of the lease will be protected as a statutory tenant."

This decision, again emphasises the distinction which I have pointed out In the case of a composite lease, where a substantial part of the rent goes in hire of machinery and plant, and Act cannot apply, what is thereby leased is not a theatre simpliciter, but a running cinema business with all its accessories The Act controls and regulates only the letting of buildings and not transfer of business concerns and running business, for periods together with the buildings The question for consideration in each case would be whether what is leased is a theatre building with its normal adjuncts as a building constructed to serve as a theatre, or something more than a building—an equipped cinema house.

It follows from the above discussion that the property demised in the present case by the plaintiff comes under the control of the Madras Buildings (Lease and Rent Control) Act, 1960, entitling the tenant to seek the protection of the Act against eviction.

Mr. V V. Raghavan, learned Counsel for the landlord, submits that even if the tenant in the present case is entitled to the protection under Act XVIII of 1960, the suit itself need not be dismissed Learned Counsel submits that there being no other defence to the suit in ejectment than the security of the tenancy provided by the Rent Control Act, all that the tenant can claim is that during the subsistence of the Rent Control Act, he cannot be evicted in execution of the decree in ejectment. My attention is drawn, in this connection, to the decision of this Court by Ramaswmi, J, in *Haji Mohamed* v *Globe Theatres*[2] Following an earlier Bench decision of this Court in *Muhammadunny* v. *M Unnuri*[3], it is observed by Ramaswami, J.—

> "It is now well settled that a decree in ejectment can be passed by the civil Court and all that the Madras Buildings (Lease and Rent Control) Act ensures is that during the subsistence of that Act the civil Court cannot execute the decree but the landlord will have to take appropriate steps under the provisions of the said Act.

The provisions of the Act then under consideration and section 10 of the present Act are identical with reference to the matter under consideration The prohibition under section 10 of the present Act runs thus

> "*Section* 10 (1).—A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16.

The jurisdiction of the Civil Court, as noticed in the decision above referred to, to pass a decree in ejectment is not taken away, though it may be of little use to the plaintiff Learned Counsel for the appellants-tenants, has not placed before me any decision con ra The Madras Buildings (Lease and Rent Control) Amendment Act (XI of 1964), which by section 3 provides for the abatement of certain proceedings, is limited in its application and does not apply to the present suit. In the circumstances there is no need to set aside the decree in ejectment which has been passed.

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1 (1960) 1 M L J. 9 (sh n)
2 A.I.R. 1956 Mad 216, 218.
3. (1949) 1 M L J 452 · I L R. (1950) Mad 152. A I.R 1949 Mad 765

But the plaintiff-decreeholder will not be entitled during the subsistence of statutory tenancy to evict the tenants, the present appellants, in execution of the decree in ejectment the remedy for eviction having to be in accordance with and under the terms and provisions of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), by appropriate steps under the provisions of the said Act. The decree would be modified accordingly.

Though the decree subject to the modification is maintained, as the appellants have succeeded in their contention, they will be entitled to their costs in this Court. The parties will bear their respective costs in the Courts below. Leave refused.

V.M.K. ——— *Ordered accordingly.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M ANANTANARAYANAN, *Chief Justice*, MR JUSTICE K VEERASWAMI, MR JUSTICE P RAMAKRISHNAN, MR. JUSTICE M. NATESAN AND MR JUSTICE M M. ISMAIL

C Subramaniam, River View, Madras-25 .. *Petitioner**

v.

The Honourable the Speaker of the Madras Legislative Assembly, Madras-9 and others . *Respondents.*

Constitution of India (1950), *Articles* 194 (3), 19, 20 *and* 21—*Scope of Article* 194 (3)—*Right of Speaker of Legislature to call upon a third party to show cause why he should not be held to have committed a breach of the privilege of the Legislature—Nature of proceedings—If liable to be stifled by the issue of a writ of prohibition on the ground of absence o* ab initio *jurisdiction and as impinging on Articles* 20 *and* 21.

Article 194 (3) of the Constitution of India vests the Speaker of the State Legislature, empowered by a resolution of the Legislature, with the right to call upon a third party, to show cause why he should not be held to have committed a breach of the privilege of the Legislature by way of contempt

It is no doubt true that Article 194 (3) was transitional or transitory in character and that enacted laws were expected to be made in this respect as early as convenient. But it is very difficult to see how any theory of automatic lapse, or lapse due to inaction can apply to Article 194 (3) in its relation to the State Legislature.

The argument that the powers, privileges and immunities thus secured by Article 194 (3) do not form a law at all, in the juristic sense is unsubstantial. Actually, this *corpus* is part of the Constitution itself. Nor can it be contended that this law is amorphous and unascertainable, though it may be true that certain sources of law, comprising precedents, are not easily available.

Where therefore a notice is issued by the Speaker of the Legislature calling upon a third party (like the petitioner in the present case) to show cause why he should not be held to have committed contempt of the Legislative Assembly, a writ of prohibition restraining the Speaker from proceeding further cannot be issued on the ground of absence of an *ab initio* jurisdiction. The argument that this is essentially a criminal jurisdiction is clearly quite inapplicable to that stage of the proceedings which is a stage of assumption of jurisdiction and nothing more. It is impossible to accept that at that stage there is any procedure whatever which impinges on Article 20 (1) or 21 of the Constitution of India.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition restraining the respondents 1 and 2 from further proceeding with the notice dated 27th February, 1968 issued by the 2nd respondent pursuant to the motion passed in the Legislative Assembly on 19th February, 1968.

* W.P. No. 897 of 1968. 14th March, 1968.

V. K. Thiruvenkatachari for *T. Martin*, for Petitioner.

M. K. Nambiyar and *K. K. Venugopal, amicus curiae.*

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—This is a proceeding under Article 226 of the Constitution, for the issue of a writ of Prohibition restraining the Speaker of the Madras Legislative Assembly (respondent 1) and the State of Madras (respondent 2) from proceeding further with the notice forming Annexure A to the petition, asking the petitioner (Mr. C. Subramaniam), to show cause why he should not he held to have committed contempt of the Legislative Assembly. The Union of India, the Attorney-General of India and the Advocate-General of Madras have been shown in the array of parties as the third, fourth and fifth respondents to the petition.

Annexure C to the petition is an excerpt from a leading daily of Madras dated 11th February, 1968, describing a speech made by the petitioner at Dindigul, under the caption "Political Fraud." The report states that Mr. C. Subramaniam (petitioner) referred to the recent Language Bill (more strictly, Language Resolution) adopted by the State Assembly, as the 'biggest political fraud'. In respect of this matter, Annexure B shows that the Legislature adopted a motion to the effect that this was a question of privilege to be dealt with by the House itself, and this motion further authorised the Speaker to issue a notice to Mr. Subramaniam, asking him to show cause why he should not be held to have committed contempt of the House, in respect of the passage in his speech, already set forth. Annexure A is the actual notice to show cause received by the petitioner, after the Speaker had held that there was a *prima facie* case of breach of privilege.

The single line of reasoning upon which this petition has been argued before us by Mr. V.K.T. Chari for the writ petitioner, proceeds on two related aspects of the law, which are set forth in the sub-paragraphs of paragraph 6 of the affidavit. Before embarking on a scrutiny of this, which is the heart of the matter, we may refer to certain earlier averments in the affidavit. We might immediately state that the accuracy of the respect of the speech, is not now in controversy, arguments were submitted, upon the basis of the report being accurate. But the petitioner states that he has been a Member of the Legislative Assembly of Madras, a Member of the Parliament, a Minister of the Madras Government and the Leader of the House in the Madras Assembly, and also a Minister of the Union Government. He is currently holding the political office of the President, Tamilnad Congress Committee. He has a duty towards the public, particularly in the field of political matters, which he must discharge fearlessly, and by virtue of rights inherent in British Subjects from the days of the *Magna Carta*, and re-affirmed by the Constitution of India, particularly in the Preamble and in Article 19 thereof. After noting these averments, we may first proceed to set forth the reasoning of Mr. Chari, upon the petition. Mr. Chari fully concedes, that, whatever might have been the somewhat hazy or indeterminate state of rights as between the subject and the Legislature and between the Legislature and the Judiciary, which hitherto prevailed, matters are now clear beyond controversy, by virtue of the dicta of the Supreme Court in three important cases, namely, *Sharma's case*[1], *Dr. Jatishchandra's case*[2], and *In re Article* 143, *Constitution of India*[3].

At the outset, Mr. Chari stressed the Preamble to the Constitution particularly the second clause thereof, which enshrines the solemn resolve to secure to all citizens of this country "liberty of thought, expression, belief, faith and worship". He would link this with the Fundamental Right to freedom of speech and expression guaranteed under Article 19 (1) (*a*), but subject to reasonable restrictions under Article 19 (2). Again, he contends that though the privileges of the State Legislature are guaranteed under Article 194 (3) in view of the failure of the State Legislature

1. (1959) S.C.J. 925: (1959) 2 An.W.R. (S.C.) 125: (1959) 2 M.L.J. (S.C.) 125: (1959) M.L.J. (Crl.) 660: (1959) 1 S.C.R. (Supp.) 806.
2. (1962) 1 S.C.J. 411: (1962) M.L.J. (Crl.) 298: (1961) 3 S.C.R. 486.
3. (1965) 1 S.C.J. 847: (1965) 1 S.C.R. 413: A.I.R. 1965 S.C. 745.

to enact the necessary law within a reasonable time, as contemplated by the firts limb of Article 194 (3), these privileges must now be regarded as subject to the Fundamental Rights of citizens. This Article states:—

> " .... the powers, privileges and immunities of a House of the Legislature of a State........shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution "

The line of reasoning that emerges from the further arguments of learned Counsel is this. Entry 39 of List II of the Seventh Schedule relates to " powers, privileges and immunities of the Legislative Assmebly and of the members and the committees thereof..........". This has to be read along with Article 246, which embodies the principles of competency of legislation, respectively by Parliament and by the State Legislature. The Constitution was completed in formulation by the Constituent Assembly on 26th November, 1949, and came into effect and force on 26th January, 1950. The old Constituent Assembly continued as a single provisional Parliament, till the respective elections were held. Clearly, therefore, Article 194 (3) was transitional or transitory in character. It was never contemplated that this state of affairs in respect of the powers, privileges and immunities of the State Legislature should continue for any indefinite term; enacted laws were expected to be made, in this respect as early as convenient. But one indisputable effect of *Sharma's case*[1], and *In re Article* 143 *Constitution of India*[2], affirming the same proposition, is that any such law hereafter to be made by the Parliament or a State Legislature, would be subject to the Constitutional limitations of Article 13, and the Fundamental Rights guaranteed under the Constitution. The State Legislature was fully aware of this, as petitions had been presented even in Parliament, and the decision of the Supreme Court in *In re Article* 143 *Constitution of India*[2], was the subject of discussion. Nevertheless, for many years, no law embodying such rights, privileges and immunities has been made and this is deliberate inaction; the consequence of it must be that what is guaranteed under the second limb of Article 194 (3) to the Legislature, is no longer available, and must be held to have lapsed by default.

Linked with this is an argument, upon what may be termed the 'Juristic norms' which have to be applied to any law, the infringement of which may expose a subject to penalties, or to any disability. Any Law is a rule, and, further, necessarily a rule of prohibition or injunction; it follows that such a rule, must be definite and ascertainable, before the subject can be exposed to untoward consequences, for infringement of the law. The Law of British Parliamentary Privileges is "wilderness of single instances". This is a vague and amorphous jurisprudence. Further, it involves a study of what those privileges were as on 26th January, 1950, and several of them might have lapsed owing to desuetude This law is hardly ascertainable for the sources of the law, namely Hansard, running into hundreds of volumes, and *Erskine May's Parliamentary Practice* are not even available, without much difficulty, to a lawyer, leave alone a citizen This entire argument is, in its turn, made to impinge on Article 20 (1) and Article 21 of the Constitution, since *In re Article* 143 *Constitution of India*[2], is authority for the view that, though the body of privileges made part of the law under Article 194 (3) may prevail, so long as this law is enforced, over Article 19 (1) (*a*), it does not prevail over Article 21 It is here stressed that such a proceeding, asking the petitioner to show cause against a conviction for contempt of the Legislature, is essentially in criminal jurisdiction Mr Chari points out, upon authority that the House of Commons in the United Kingdom, unlike the House of Lords, does not impose a fine or imprisonment for limited periods, but

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1. (1959) 2 An W R (S C) 125 : (1959) 2 M.L J. (S.C.) 125 : (1959) M L J (Crl.) 413 A I R 1965 S C 745 660 (1959) S.C J. 925.
2. (1965) 1 S.C J. 847 (1965) 1 S.C R.

directs an indefinite detention in custody, of the person in contempt This infringes Article 21 and Article 20 (1), the combined effect of which Articles is to declare that no person can be proceeded against with regard to any offence, except for the violation of a law in force, and according to procedure established by law

Before dealing with these arguments, it may be necessary to set forth certain postulates or propositions which are very clear and now well established, in the light of the decisions of the Supreme Court, already referred to Since, for this purpose, we have already largely to draw upon the observations in *In re Article* 143 *Constitution of India*[1], and many paragraphs of this Judgment in the text have been read before us, we shall set forth the bare propositions, in the interests of brevity, confining ourselves to citing only one or two observations of the learned Chief Justice (Gajendragadkar, C J)

Firstly, the perspective of approach to any question of this kind has been determined, in constitutional terms, in paragraph 43 To quote.

"In this connection it is necessary to remember that the status, dignity and importance of these two respective institutions, the Legislatures and the Judicature are derived primarily from the status, dignity and importance of the respective causes that are assigned to their charge by the Constitution These two august bodies........... must function not in antimony nor in a spirit of hostility, but rationally, harmoniously and in a spirit of understanding within their respective spheres..... ... ".

Next it may be taken as now settled beyond doubt that any law that the State Legislature may enact under Article 194 (3) with regard to its powers, privileges and immunities, will be subject to Article 13, and the Fundamental Rights guaranteed under the Constitution. Thirdly, it may be taken as the Constitutional Law, however, that the *corpus* of law which has to prevail, until, such an enactment is made, will not be subject to Article 19 (1) (*a*), because under the rule of harmonious construction, the particular provision in Article 194 (3) will have to prevail. But, equally, this *corpus* of law will be subject of the right guaranteed under Article 21. We may take it that the content of Article 21, may have to be interpreted also in the light of the terminology of Article 20 (1) of the Constitution

Fourthly, while the foregoing postulates may be true of the respective spheres of action of the Legislature in respect of its powers and immunities, and the Judiciary, it does not mean that a final order imposing a disability on a subject, for alleged breach of privilege or contempt of the Legislature will not be justifiable It has to be carefully noted that, in paragraph 129 (page 787), their Lordships have referred to the amplitude of the unrestricted power of the High Court under Article 226, and, in another context, they have not approbated the dicta of Dixon, C J, in the *Queen* v. *Richards*[2], that, if the warrant issued by the Legislature does not specify the grounds of commitment, it is conclusive This matter need not be further referred to for the simple reason that, notwithstanding what Mr Chari strenuously urged on this aspect, we are not here concerned with any warrant, or anything analogous to a committal proceeding We are concerned, purely and simply, with a notice to the writ petitioner to show cause why he should not be held to have committed a breach of privilege of the Legislature, by way of contempt of the Legislature Further, it is clearly premature, and even impossible, to judge now, upon the matter of the alleged contempt itself; we may add that the affidavit itself contains no averments with regard to this What we are asked to do is to issue a writ of prohibition restraining the Speaker of the Legislative Assembly from proceeding further, which is virtually on a ground of absence of an *ab initio* jurisdiction.

Mr Chari has referred to a passage in Halsbury's Laws of England, Simonds Edition, Volume 5, page 478 (section 1058), with regard to the extent of power of the privilege of Legislatures, as applying to the Commonwealth It is claimed

1. (1965) 1 S.C J 847 (1965) 1 S C.R. 413 A I R 1965 S.C 745
2. 92 C.W L.R 157, 167

that these privileges do not include any power, " to punish by arrest and commitment" The authorities cited are *Fontop* v *Hampton*[1], and *Doyle* v *Falconer*[2]. But, obviously, we are not further concerned with this aspect, for we are here upon the effect of Article 194 (3) of our Constitution, and the body of rights, privileges and immunities which it thereby secures to the State Legislature The same observations may apply to the dicta cited from Moore on the Australian Constitution, 2nd Edition, page 138-A.

It is very difficult to see how any theory of automatic lapse, or lapse due to inaction, can apply to Article 194 (3), in its relation to the State Legislature. It is of considerable interest to note, and this is discussed in *In re Article* 143 *Constitution of India*[3], itself, that section 49 of the Australian Constitution was in almost identical terms, except that the operative word was 'declare' But, as Mr. Nambiar, assisting us as *amicus curiae*, has emphasised, though this was over sixty years ago enactments have not superseded the state of rights secured for the Legislature by section 49 in Australia, except in two minor respects ; apparently, the Legislature was content with the body of rights, privileges and immunities thus secured, without seeking any enlargement or modification We may take notice of the fact that certain petitions have been submitted to Parliament and to the State Legislature, stressing the need for early enactment, in the interest of the rule of law, Mr Chari has described ; but it is impossible to arrive at any conclusion that the inaction is deliberate, far more so, to sustain any theory that such inaction has the effect of a lapse or extinction *Per contra*, Mr. Nambiar points out that where the Constitution intends setting a term to any situation of rights, it explicitly says so, and Article 334, 337 and 343 are very clear instances

The argument that these powers, privileges and immunities thus secured for the Legislature, do not form a law at all, in the juristic sense, is equally unsubstantial. Actually, this *corpus* is part of the Constitution itself Nor can it be contended that this law is amorphous and unascertainable, though it may be true that certain sources of the law, comprising precedents, are not easily available. Mr. Nambiar has set forth before us certain interesting passages in " Constitutional and Administrative Law " by Hood Philips (3rd Edition), pages 186 and 187 It is very clear from these paragraphs, that defamatory or disrespectful speechs, outside the House of Commons, by third parties, reflecting on the House, or tending to bring the House into contempt or ridicule could be properly regarded as contempt of the Legislature There are even precedents, such as *Alligan's case*[4], but we need not explore any further into this aspect here, for obvious reasons The argument that this is essentially a criminal jurisdiction, because as observed in *In re Article* 143 *Constitution of India*[3], the practice of the House of Commons has been, not to impose fine for contempt, while it may detain indefinitely, is clearly quite inapplicable to the present stage of the proceedings. This is a stage of assumption of jurisdiction, and nothing more. Actually, if we are to judge from the passage at page 189 of Hood Philips (earlier cited), Reprimand and Admonition are also included in forms of punishment, which are open to the House of Commons It is impossible to accept the argument that we have, at the present stage, any procedure whatever, which impinges on Article 20 (1) or Article 21 of the Constitution of India.

Finally, a word may be stated about the character of a writ of prohibition, even though this Court is not confined to the precise scope of the prerogative writs in the United Kingdom, and Article 226 embodies a wider amplitude of power. The history of this writ, and the true scope of its issue and function, were discussed by a Division Bench of this Court in *T M Transports (P) Ltd* v *R T Authority*[5] The following few lines from that decision are useful, as succinctly stating the situation at law.

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1 (1858) 2 Moo P C 347.
2. (1866) L R 1 P C 328
3 (1965) 1 S C J 847· (1965) 1 S C R. 413: A I R 1965 S C. 745
4 (1947) H C Pap 138.
5 (1965) 2 M L J 453 I L R (1965) 2 Mad 461 A I R 1966 Mad. 8 at page 12

"If, in each one of these cases, a party, who might be affected by such a possible decision, can be permitted to come up to this Court and ask for prohibition to go, though it might be perfectly probable that the inferior Tribunal would have jurisdiction upon facts being established in a particular way, this would really imply that many proceedings quite within the competence of such authorities or which may be ultimately found to be comprised in the jurisdiction, may be stifled at the outset........ If there is jurisdiction over the matter before the Tribunal *prima facie* and facts canvassed before it, one way or another, may affect the issue as to the boundary of that jurisdiction, we think, that, the Tribunal should be permitted to function, and to determine its own jurisdiction, the writ should not issue to paralyse such an enquiry"

For the above reasons, we are clearly of the view that Article 194 (3) invests the Speaker of the Legislature, empowered by a Resolution of the Legislature, with the right to call upon a third party, like the writ petitioner, to show cause why he should not be held to have committed a breach of the privilege of the Legislature, by way of contempt. That is all that has happened, and a writ of prohibition need not be issued by this Court to stifle the very exercise of that jurisdiction We need not emphasise, both as a matter of caution and as a necessary corollary, that we are stating nothing whatever about the averments themselves in the notice or the degree to which such facts will or will not constitute a contempt of the Legislature. These are matters which it is quite premature for us to refer to, at this stage. This writ petition will, therefore, be dismissed *in limine*.

We must record our obligation to Mr. M. K. Nambiyar, appearing with Mr. K. K Venugopal, who has rendered us valuable assistance as *amicus curiae*.

V.K. —— *Petition dismissed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K VEERASWAMI.

Parasmal Chordia .. *Petitioner**

v.

Rajalakshmi Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 8-A, rule 1—Third Party Procedure—Scope and applicability of—Whether applies to suits on negotiable instruments.

All that is necessary for the application of third party procedure is whether if the plaint claim is allowed the defendant has a claim, in that event, for indemnity by reason of such claim being allowed, from a third party If that requisite is satisfied, the Court will not be justified, on any extraneous ground, from refusing third party procedure There is nothing in the rule suggesting that it has no application to suits on negotiable instruments

There is no limitation that the rule is applicable only to a claim of indemnity arising out of the same transaction or a transaction entered into simultaneously with the transaction sought to be enforced in the suit. The rule is conceived for the benefit of a defendant who, if defeated in respect of a claim against him, is entitled to reimbursement by way of indemnity. In such a case the policy of the rule is that the defendant need not be driven to a fresh suit to put indemnity into operation

Rule 3 of order 8-A of the civil Procedure Code does not limit the scope of rule 1 so as to make it applicable only to cases where the suit claim is admitted.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore, dated 4th November, 1967, and made in I A. No 803 of 1967 in O S. No. 93 of 1967

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* C R P. No. 2348 of 1967 7th November, 1968.

K. Gopalachari for *G. Krishnan* and *K. Sampath*, for Petitioner.

N. R. Raghavachari, for 1st Respondent.

N. C. Raghavachari, for Second Respondent.

The Court made the following,

ORDER.—This petition is directed against an order of the Subordinate Judge of Cuddalore dismissing an application of the petitioner made under Order 8-A, rule 1 of the Code of Civil Procedure. The suit was laid on a promissory note said to have been executed by the defendant who is the petitioner, on 21st June, 1964. He resisted the suit on the ground that the promissory note was not supported by consideration, and also maintained that the plaintiff's son had executed an agreement or varthamanam of 4th July, 1964, admitting that the promissory note was not supported by consideration and that, in case, it was successfully enforced, he would indemnify the defendant. Evidently, on the basis of the last averment, the defendant took out the application under Order 8-A for third party notice to the son of the plaintiff The application was dismissed by the Subordinate Judge by placing reliance on *Uthaman Chettiar* v *T. K. Thiagaraja Pillai*[1] Panchapakesa Iyer, J., was of the view, in that case, that the third party notice procedure should not be applied to suits on negotiable instruments.

With due respect to the learned Judge, the limitation placed by him does not appear to be justified by the language of rule 1 of Order 8-A. The order relates to third party procedure and the first rule says that where a defendant claims to be entitled to contribution from or indemnity against any person, not already a party to the suit, he may, by leave of the Court, issue a notice, called a third party notice, to that effect. That simply means that where in a suit the defendant, in case the plaintiff succeeds, is entitled to indemnity from a third party, who has not been already brought on record, he is entitled to ask for a third party notice. There is nothing in the rule suggesting that it has no application to suits on negotiable instruments.

It is argued that the rule is applicable only to a claim of indemnity arising out of the same transaction or a transaction entered into simultaneously with the transaction sought to be enforced in the suit. The answer in rule 1 itself contains no such limitation. Nor does the reason of the rule demand such a limitation. This rule is conceived for the benefit of a defendant who, if defeated in respect of a claim against him, is entitled to reimbursement by way of indemnity. In such a case the policy of the rule is that the defendant need not be driven to a fresh suit to put indemnity into operation. That, in my view, should be the approach to the procedure for third party notice.

The further contention for one of the respondents is that Order 8-A itself will be attracted only in cases where a defendant admits liability on the main transaction sued upon Support is sought to be derived, for this contention, from rule 3 of Order 8-A. This rule only states that if the third party desires to defend himself he may do so, but, if he does not enter appearance, he shall be deemed to admit the validity of the decree against the defendant and his own liability to indemnify to the extent claimed in the third party notice. This does not mean that rule 3 limits the scope of rule 1 so as to make it applicable only to cases where the suit claim is admitted.

Learned Counsel for the petitioner urged that suits on negotiable instruments being of a simple character, by admitting third party procedure it should not be complicated, and, from this standpoint, the view of *Uthaman Chettiar* v. *T. K. Thiagaraja Pillai*[1], is the correct one As it seems to me it is the same or similar point as the one I have already adverted to earlier. Ramachandra Iyer, J., as he then was in *P S Pattabhiraman* v *Ganapathy*[2], referred to *Uthaman Chettiar* v. *T. K Thiagaraja Pillai*[1] and interpreted it in such a way as to practically emasculate

1. (1955) 68 L.W. 810 : A.I.R 1956 Mad. 155.

2. (1962) 1 M L.J. 246 : A.I.R. 1962 Mad. 202.

its effect What seems to me is that Ramachandra Iyer, J., in the context, did not feel inclined to accept the view of Panchapakesa Iyer, J, in *Uthaman Chettiar* v. *T. K Thiagaraja Pillai*[1]. This is clear from the observation of Ramachandra Iyer, J, himself in that judgment, to wit, there is nothing in the language of rule 1 of Order 8-A to forge any such limitation to its scope.

Conceived, as it is, for the benefit of the defendant, as I had already stated, all that is necessary for the application of third party procedure is whether if the plaint claim is allowed the defendant has a claim, in that event, for indemnity by reason of such claim being allowed, from a third party. If that requisite is satisfied, the Court will not be justified, on any extraneous ground, from refusing third party procedure. Counsel for the proposed third party urged that on the terms of the Varthamanam if the suit promissory note was found to be without consideration it would be dismissed, and in that case, no question of indemnity would arise. But, Counsel fails to take note of the fact that if the suit is decreed and the Varthamanam is found to be true and the claim for indemnity can be based on that, the defendant would be entitled to a decree for indemnity as against the third party.

The petition is allowed with costs. One set.

S.V.J. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE P. S. KAILASAM.

The Super Surgical Co. .. *Petitioner**

v.

S. Desikan and another . *Respondents*

Industrial disputes—Power of Labour Court—If can grant leave to withdraw an application with premission to file a fresh application on the same grounds

Neither in the Industrial Disputes (Central) Rules nor in the Madras Industrial Disputes Rules, the Labour Court is empowered to grant leave to withdraw an application with permission to file a fresh application on the same grounds. The Labour Court, cannot therefore permit the withdrawal of a claim petition filed under section 33 (*c*) (2) of the Industrial Disputes Act without prejudice to the right of the claimant to file a fresh petition based on the same allegations.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *certiorari* calling for the records in C.P No 263 of 1966 of the second respondent and quash the same

N S Raghavan, for Petitioner.

R. Ganesan, for Respondent.

The Court made the following

ORDER.—This petition has been filed by the management for the issue of a writ of *certiorari* to call for the records of the Presiding Officer, Labour Court, and to quash its order entertaining a fresh petition filed by the first respondent on the same matter on which an earlier petition was dismissed

The first respondent was an employee of the petitioner-firm The services of the first respondent was terminated after giving a full month's notice and according to the petitioner, the first respondent accepted the notice and stayed away from service The first respondent subsequently filed a claim petition under section 33 (*c*) (2) of the Industrial Disputes Act, before the Labour Court, Madras, claiming a sum of Rs 4,740 under various heads like retrenchment compensation, earned

1. (1955) 68 L.W 810 : A.I.R. 1956 Mad 155.

* W P. No 1775 of 1966 5th September, 1968.

wages, leave wages, bonus, commission and gratuity. The petition was numbered as C P. No. 143 of 1965 The petitioner filed a counter and the matter, after several adjournment, was taken up on 23rd November, 1965 The first respondent stated that he was not pressing the petition He made an endorsement and the petition was dismissed Subsequently, the first respondent came up with a fresh claim petition No. 263 of 1966 based of the same grounds as C P. No. 143 of 1965. The petitioner filed a counter taking a preliminary objection that as the previous petition on the same ground has been dismissed by the Labour Court, it was not open to the Labour Court to entertain a fresh petition on the same allegations This objection was overruled and hence this writ petition

According to the Labour Court, as the first respondent made an endorsement to the effect that he was withdrawing the petition without prejudice to the right to file a fresh petition, he filed a fresh petition in accordance with the endorsement and therefore, the management cannot question his right to do so In this connection, it may be stated that the order of the Court is, "dismissed" and it does not refer to the endorsement or that it granted leave to withdraw the petition and to file a fresh petition Apart from this obstacle that no leave was granted by the Court to file a fresh petition, there is a legal objection to the entertainment of the fresh petition.

Section 11 (3) of the Industrial Disputes Act provides that the Labour Court shall have powers as are vested in a civil Court under the Civil Procedure Code, 1908, when trying a suit, in respect of the matters enumerated in the section. Section 11 (3) (*d*) empowers the Labour Court to exercise the powers in respect of matters that may be prescribed under the rules.

Neither in the Industrial Disputes (Central) Rules nor in the Madras Industrial Disputes Rules, the Labour Court is empowered to grant leave to withdraw an application with permission to file a fresh application on the same grounds. As this power has not been conferred on the Labour Court, the Labour Court cannot exercise such power. It is not disputed that the principle of *res judicata* is applicable to the Labour Court and the Labour Court would not entertain a fresh petition on the same cause of action unless it is empowered to do so. As there is no provision for entertaining a fresh application, the preliminary objection taken by the petitioner before the Labour Court will have to be upheld.

This writ petition is allowed and the preliminary objection by the petitioner before the Labour Court is upheld and the first respondent's petition before the Labour Court is dismissed. No order as to costs.

V K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice.*

V. P. Periakaruppan *alias* Manickam Ambalam .. *Petitioner**

v.

P. Mayalagan and another .. *Respondents.*

Negotiable Instrument—Suit by plaintiff under an assignment constituting him as an agent for collection—Subsequent death of principal—Suit if liable to be dismissed—Proper procedure to be followed

Where a plaintiff sues on a negotiable instrument under an assignment in his favour constituting him as an agent for collection, the subsequent death of the principal will not render the suit incompetent With the death of the principal the authority of the endorsee for collection does not end However, in such a case, the executant should be protected against a possible double jeopardy,

* C.R P. Nos. 708 and 839 of 1966. 11th January, 1968

namely, a further claim on the bill or instrument by the heirs of the deceased principal. This can be very simply avoided, by the Court calling on the plaintiff to implead the legal representatives of the deceased principal as parties to the action

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif's Court of Melur in S C Nos. 294 and 341 of 1966 respectively.

T. V. Balakrishnan, for Petitioner.

S. Sankar Ramakrishnan, for Respondents

The Court delivered the following

JUDGMENT.—Both these revision proceedings involve only one short ground. In two suits on a negotiable instrument, all the pleas upon which the executants resisted the decrees of the suits have been negatived on the merits. But, in each of these two suits, the same plaintiff sues under an assignment in his favour, constituting him as an agent for collection, even on a minimal interpretation. It is claimed that the principal was alive, at least when one of the two suits was filed, and the learned Counsel for the revision petitioner claims that the principal was alive on the date of institution of both the suits.

However that might be, the principal died shortly thereafter. The suits have been dismissed, though they were otherwise entirely justified on the merits of the findings, on the short point that the agency for collection having come to an end with the death of the principal, the suits were no longer maintainable.

In my view, this is a quite erroneous conception of the respective legal rights of the parties. So long as there is an endorsement of assignment in favour of the plaintiff in each case, the plaintiff can claim to be a holder in due course, *ex facie*. It is not in dispute that the suit is perfectly maintainable, if it is instituted when the principal was alive, as is actually claimed. The decision relied upon by learned Counsel for the respondent in *Subramania Chetti* v. *Alagappa Chetti*[1], judgment of Benson and Wallis, JJ., does not at all help to advance the contention that, with the death of the principal, the suits themselves are extinguished. All that this decision states is that, as between the endorser and the endorsee the endorsement for collection *simpliciter* does not pass the property in the bill to the endorsee. Again, when the suit was validly instituted on the date when it was instituted, I am quite unable to see how it can be dismissed because of a subsequent event, such as the death of the principal, which does not affect the substance of the claim

In my view, the true equity in favour of the executant of any such instrument, where the principal happens to die *pendente lite*, is that he (the executant) should be protected against a possible double jeopardy, namely, a further claim on the bill or instrument by the heirs of the deceased principal. This can be very simply avoided, by the Court calling on the plaintiff to implead the legal representatives of the deceased principal as parties to the action so that the matter can be adjudicated upon in their presence That is all the more essential in the present case, as Mr Balakrishnan, for the plaintiff, contends that this is not a bare agency for collection at all, but an agency coupled with an interest in the agent in the proceeds of the bill, acknowledged by the principal

I accordingly allow the revision, set aside the dismissals of the two suits, and direct that they be restored to file and disposed of in the light of the observation that I have made. I may add that there is a decision of the Lower Burma Chief Court *Ramzan Ali* v *Vellaswami*[2], for the view that, with the death of the principal, the authority of the endorsee for collection does not end, the note being negotiable, and that he is a holder under the law to whom payment has to be made Of course,

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1 (1907) 17 M L.J. 414: I L.R. 30 Mad 441 2 (1910) 8 I.C. 967.

if there is any claim available to the defendants which is not already *res judicata*, concerning the actual liability, the defendants may be at liberty to agitate that claim. After the legal representatives are brought on record, it will be for them to state whether the decree should be in the joint names of both the plaintiff and themselves, or they will be satisfied with decrees of these suits in the name of the plaintiff. Remitted accordingly No costs.

V.K. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Rangaswami and another .. *Appellants**

v.

T R C. Krishnan and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 66—Bar of suit under—Scope of.

Section 66 of the Code of Civil Procedure does not prohibit benami transactions which have always been recognised in this country and the bar under the section is limited to cases where the suit is brought against the certified purchaser or his representatives. There is nothing in the section to forbid the recognition of the real owner's title by the benami Court auction purchaser or his heirs. *Mst. Buhuns Kowur* v. *Behoree Lall*, (1870) 14 M I.A. 496 ; *Monappa* v. *Surappa*, I.L.R. (1888) 11 Mad. 234, Ref.

In such cases a release deed executed by the Court auction purchaser in favour of the real owner or his heirs might well be construed as a deed of transfer or conveyance sufficient to vest the title in the true owner.

Arumugam Chettiar v. *Kuppuswami Chettiar*, (1961) 2 M L J. 265, Ref.

Appeal against the decree of the Sub-Court, Vellore, in A S. No. 482 of 1961 preferred against the decree of the District Munsif of Tirupattur in O S. No. 359 of 1960.

Parasaran, S K. Rajavelu, R. Shanmugnm and *K. Ramachandran*, for Appellants.

R. Gopalaswnmi Ayyangar and K N Balasubrnmaniam, for Respondents.

The Court delivered the following

JUDGMENT —This second appeal has been filed by defendants 1 and 2 in O.S. No. 359 of 1960 on the file of the Court of the District Munsif, Tirupattur. The properties involved in the suit admittedly belonged to them But the case of the plaintiffs is that the first plaintiff became the lawful owner thereof. It is stated that one T. S Ramasesha Iyer, brought the properties to sale in execution of a money-decree which he obtained in S C No. 755 of 1932, on the file of the Court of the District Munsif, Tirupattur, against the appellants, purchased the properties in Court auction himself and obtained the sale certificate Exhibit A-1, dated 17th April, 1935 and took such delivery as was possible under Exhibit A-2 on 4th July, 1935. It is further alleged that T S Ramasesha Iyer, was throughout acting as a benamidar for his brother T. S Chengalvaraya Iyer, the explanation being that Chengalvaraya Iyer, was a retired Deputy Collector and it was felt advisable that such transactions should not figure in his name. Indeed, after the death of Ramasesha Iyer, his sons and grandsons executed a registered release deed Exhibit A-3, dated 10th August, 1937, acknowledging the fact that the Court auction purchase was on behalf of T. S Chengalvaraya Iyer. The deed purports to be a release deed.

Even when the properties were purchased in the auction, they were subject to three mortgages, one of them being an usufructuary mortgage, Exhibit B-1, dated 28th September, 1929, in favour of Jayalakshmiammal and Lalithambal, the

* S.A. No 824 of 1963 12th July, 1967.

daughter and granddaughter of Chengalvaraya Iyer. The others were simple mortgages The case of the first plaintiff is that these mortgages were redeemed by Chengalvaraya Iyer and Chengalvaraya Iyer thus got possession and adopted the first plaintiff as his son and the first plaintiff was throughout in possession. It may be noted here besides the above relationship; the plaintiff T R.C Krishnan (who is the natural son of T S. Ramasesha Iyer became the adopted son of Chengalvaraya Iyer. In other words, on account of the nearness of the relationship of the usufructuary mortgagees, it was easy for the first plaintiff to get into possession. Though the first plaintiff had leased the properties to plaintiffs 2 to 7, fearing that the defendants might interfere with their possession, the suit was brought for a declaration of the title of the first plaintiff and for an injunction restraining the defendants from interfering with the possession of the plaintiffs. An *ad interim* injunction was issued. However, on the allegation that the defendants trespassed into the properties after 3rd March, 1961, the plaintiffs got the plaint amended to include a prayer for possession

The written statement of the defendants filed originally was that they were not aware of the proceedings in execution of the decree in S C No. 755 of 1932, under the Court auction purchase and delivery through Court They admitted that the first plaintiff had been in possession, but they explained it on the ground that he was looking after the properties as the agent of the usufructuary mortgagees, Jayalakshmi Ammal and Lalithambal. They further contended that on the lapse of 30 years from the date of usufructuary mortgage it got extinguished under the provision of section 9 of the Madras Agriculturists Relief Act (IV of 1938), and that Jayalakshmiamal and Lalithambal were good enough to recognise this fact and surrender possession of the properties to defendants 1 and 2 sometime in Chitrai (April-May) 1960. They were thus in possession. But when the trial Court granted the *ad interim* injunction, they vacated the lands They disclosed the subsequent trespass of 3rd March, 1961 They thus denied the plaintiff's title and they also denied the first plaintiff's status as adopted son of Chengalvaraya Iyer.

The learned District Munsif who tried the suit accepted the case of the plaintiffs in full, rejected the defence and decreed the suit Defendants 1 and 2 filed an appeal which was heard by the learned Subordinate Judge who also concurred with the findings of the learned District Munsif and dismissed the appeal In particular, the learned Subordinate Judge found as fact that the equity of redemption was extinguished at the Court sale on 17th April, 1935, Exhibit A-1, that the purchase was benami for T. S Chengalvaraya Iyer, that the first plaintiff was the adopted son of Chengalvaraya Iyer, and thus became entitled to the properties as a result of the release deed Exhibit A-3, dated 10th August, 1937, and the patta Exhibit A-4 dated 28th September, 1936 issued in favour of Chengalvaraya Iyer, that the first plaintiff was throughout in possession as evidenced by the several lease deeds Exhibit A-5 etc , and paid kist himself, that on the date of the suit he was in possession, that the story of the defendants having obtained possession from the usufructuary mortgagees Jayalakshmiammal and Lalithambal was not true and that the defendants trespassed into the properties on 3rd March, 1961

Aggrieved by the dismissal of the suit, defendants 1 and 2 have preferred this second appeal The point of law raised on their behalf by their learned Counsel Sri Parasaran is two-fold : (1) that in view of section 66 of the Civil Procedure Code, it is not open to the first plaintiff to contend that the Court auction purchase by T. S. Ramasesha Iyer, was benami for T. S Chengalvaraya Iyer, and (2) that the release deed, Exhibit A-3, dated 10th August, 1937, was not sufficient in law to pass the title of T.S Ramasesha Iyer, to Chengalvaraya Iyer, and that a regular conveyance was necessary to transfer the said rights of Ramasesha Iyer

Section 66, Civil Procedure Code, runs thus :—

" 1. No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the

ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims"

It is clear that the contention of the learned Counsel cannot prevail, because the suit is not against T S. Ramasesha Iyer or those claiming under T. S Ramasesha Iyer. Section 66 forbids only such a suit against a certified purchaser or those claiming under him As a matter of fact, according to the finding of the learned Subordinate Judge, which is binding on me, Ramasesha Iyer's heirs acknowledged the fact that the purchase was benami on behalf of Chengalvaraya Iyer There is nothing in section 66 to forbid such recognition of the real owner's title by the benami Court auction purchaser of his heirs It will be seen presently that section 66 does not prohibit benami transactions which have always been recognised in this country, and that the scope of section 66 is limited to a case where the suit is brought against the certified purchaser or his representatives This position has been uniformly recognised by the Privy Council. *Mst Buhuns Kowur* v *Behoree Lall*[1], *Monappa* v. *Surappa*[2], *Sankuni Nayar* v *Narayana Nambudiri*[3], *Kumbalinga Pillai* v. *Ariaputra Padiachi*[4], *Amruta Venkatappa* v. *Vavillala Jaluyya*[5].

In *Mst Buhuns Kowur* v. *Behoree Lall*[1], the Court auction purchaser brought the suit for redeeming an usufructuary mortgage The defence of the usufructuary mortgage was that the Court auction purchase itself was benami for him. That defence was found to be true and it was consequently held that it was not open to the certified purchaser to redeem the usufructuary mortgage. The certified purchaser invoked the provisions of section 260 of the then Civil Procedure Code, Act VIII of 1859, which was substantially similar to the present section 66 (1) and ran thus:

> "The certificate shall state the name of the person who at the time of sale is declared to be the actual purchase, and any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

Their Lordships of the Privy Council had no hesitation in holding that this provision was not available to the certified purchaser They started by pointing out that in equity and good conscience, his claim could not succeed, and that unless the statutory provision was so compelling, as to preclude the Court from recognising the defence of the usufructuary mortgagee, the usufructuary mortgagee's right had to be upheld They pointed out that the benami purchases were common in India and that the statutory provision above cited did not intend to invalidate such benami purchases and that the scope of section 260 was limited to the circumstances indicated in the section, namely, where the suit was brought against the certified purchaser on the ground that it was benami purchase But in the instant case the converse was the case and it was the certified purchaser who was trying to redeem the usufructuary mortgage The prohibition contained in the statutory provision did not extend to such a situation

The above decision was applied by Muttuswami Aiyar and Brandt, JJ, in *Monappa* v *Surappa*[2]. There it was found that one Surappa had purchased some property in Court auction on behalf of one Lingamma Shettati, his sister. The deposit of Rs 600 which had to be made immediately was the money of the sister Surappa provided the balance of the purchase money of Rs. 1,650 He put his sister in possession of the property and agreed to execute a formal sale deed on the sister paying him the sum of Rs. 1,650 which had been advanced by him. But he went back on this arrangement and ejected his sister The sister thereafter brought a suit O S. No. 73 of 1884 on the file of the District Munsif's Court of Kandapur, to recover possession The defendant pleaded the bar under section 317, Civil Proce-

1. (1870) 14 M I A 496
2. I L R (1888) 11 Mad 234
3. I L R (1894) 17 Mad 282 4 M L J 64
4. I.L.R. (1895) 18 Mad 436 · 5 M L J 200.
5. (1919) 37 M L.J, 98 . I L R 42 Mad. 615

dure Code (corresponding to section 66 of the present Code). The defence was upheld by the learned District Judge, who tried the suit The sister filed the appeal. The appeal was allowed and it was held by the learned Judges that section 317 was not a bar. The learned Judges relied on the Privy Council decision in *Mst Buhuns Kowar* v. *Behoree Lall*[1], and observed.

"It is obvious, therefore, that when after obtaining certificate of sale, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which unequivocally indicates an intention to waive his right or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties operate as a valid transfer of property, the reason being that benami purchases are not made illegal, though the real purchaser, is disabled from maintaining a suit against the certified purchaser at an auction sale in execution of a decree on the sole ground that he was only a benamidar."

The plaintiff was given a decree on payment of Rs. 1,650 to the respondent-defendant.

It is unnecessary to refer in detail to the other decisions which have followed the same principle. In view of the above decisions, it is clear that the present suit is not barred under section 66, Civil Procedure Code The above decisions themselves, in particular, the decision in *Monappa* v *Surappa*[2], are also authorities for showing that the release deed Exhibit A-3 was sufficient in law to perfect the title of Chengalvaraya Iyer. The principle is that benami purchases not having been made illegal by section 66, Civil Procedure Code, Chengalvaraya Iyer had a pre-existing title which could well be validated by the Court auction purchaser Ramasesha Iyer or his heirs and for the purposes of validating a pre-existing interest, a release deed was sufficient and a conveyance as such was not necessary.

In addition Sri R. Gopalaswami Iyengar and Sri K N Balasubramaniam for the respondent-plaintiffs rely on the two decisions reported in *Arumugam Chettiar* v. *Kuppuswami Chettiar*[3], and *T Mammo* v. *Ramunni*[4], and contend that Exhibit A-3 though styled as release deed, could well be construed as a deed of conveyance of whatever rights T. S Ramasesha Iyer had to Chengalvaraya Iyer *Arumugam Chettiar* v *Kuppuswami Chettiar*[3], was a case where the release deed, Exhibit B-1 in that case was so construed, though there was no consideration for the release deed. It specifically stated that the plaintiff had no right at all in the properties as well as outstandings belonging to Kannammal and that the defendants would be entitled to enjoy the properties without any objection whatsoever and with all rights. The learned Judges held that the effect of the deed was to operate as a transfer of whatever rights the plaintiff had to the defendants In *T. Mammo* v *Ramunni*[4], their Lordships of the Supreme Court held that the deed which was styled as a release deed in that case could be construed as a deed of transfer and observed :

"We think that a registered instrument styled a release deed releasing the right, title and interest of the executant in any property in favour of the release for valuable consideration may operate as a conveyance, if the document clearly discloses an intention to effect a transfer"

Their Lordships observed that the nomenclature of the deed and the amount of the stamp paid on it, though relevant, were not conclusive on the question of construction.

In the case before the Supreme Court, the deed was for a consideration whereas, in the present case, Exhibit A-3 was for no consideration. To that extent, it may not be right to say that it is a decision directly applicable The decision in *Arumugam Chettiar* v. *Kuppuswami Chettiar*[3], is however, directly applicable to the facts

1. (1870) 14 M.I.A. 496.
2. I.L.R. (1888) 11 Mad 234.
3. (1961) 2 M L J. 265
4. (1966) 1 S C J 138 A.I.R. 1966 S.C. 337

of this case Exhibit A-3 on its terms, could be construed as disclosing the intention of the executants to transfer whatever rights they had to Chengalvaraya Iyer. It is true that, on the footing that a conveyance is required to be properly stamped Exhibit A-3 was not properly stamped But an objection that the deed is not duly stamped cannot be taken after the document was admitted in the trial Court in view of the provision in section 36 of the Indian Stamp Act Further, their Lordships of the Supreme Court have pointed out that that is not a decisive criterion.

Mr. K. Parasaran, learned Counsel for the appellants, has relied on the decision of the Supreme Court in *Damodharan Namboodri* v. *Narayana Pillai*[1]. Exhibit A-4 in that case was a deed by which one Nagayya Antharjanam stated that by reason of certain marriage being in what is described as "Sarvaswadhanam" form the appellants were entitled to all moveable and immoveable properties belonging to Kopparathu Illom, and therefore she was executing the release deed conferring all the rights and claims the appellants had obtained over the Illom properties by the Sarvaswadanam form of marriage It was however found as a fact by their Lordships that the marriage was not in the Sarvaswadanam form and the appellants, had, therefore, no pre-existing rights as was assumed in Exhibit A. Since the document purported to confirm only the pre-existing rights of the appellants and as it was found that there was no pre-existing rights it was held that the document was not sufficient to convey any interest to the applicant The question therefore turned on the construction of Exhibit A in that case. Apart from the question of construction, the present case is distinguishable, because, here it has been found as a fact that Ramasesha Iyer was only a benamidar for Chengalvaraya Iyer and therefore the recitals to that effect in Exhibit A-3 are operative.

Thus the first plaintiff had valid title and the other points particularly of possession, have been found in his favour by the lower appellate Court and these findings are binding on me. The appeal fails and is accordingly dismissed, but without costs. No leave.

R M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI

Mayilswami Chettiar .. *Appellant* *

v.

Kaliammal and others .. *Respondents*

Guardian and Wards Alienation of minor's property by de facto *guardian (mother) with the acquiescence of the legal guardian—Alienation, if should be for necessity*

On the question whether even where there is a father for the minors alive, the mother can, acting as *de facto* guardian of the minors, alienate their property for necessity, *held that,* the father having attested the mortgage deed, the father should be deemed to have acquiesced in the mortgage and the alienation would be valid, if it is for necessity.

Appeal against the decree of the District Court, Coimbatore, in A.S No 319 of 1961 preferred against the decree of the District Munsif of Coimbatore in O.S. No 499 of 1960.

A. V. Ayyar, P. R. Vasudeva Ayyar and *M Srinivasan,* for Appellant.

G. Ramanujam, J Kanakaraj and *N. Vanchinathan,* for Respondent

The Court delivered the following

JUDGMENT —The first defendant is the appellant The defendants' mother executed a mortgage on the foot of which the suit out of which this second appeal

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1. (1959) S C J. 545 A I.R 1958 S.C 832.

* S.A. No. 696 of 1963. 23rd August, 1967.

arises was filed. The mortgage was for Rs 1,500 and the lower appellate Court has now found that the mortgage is supported by necessity only to the extent of Rs. 900. The recital in the mortgage is that it was borrowed for family expenses P.W. I gave evidence that they made enquiries about the debt and necessity of the minors and that only after satisfying themselves they lent the money P W 2 gave evidence that the money was spent for maintenance and education of the defendants and also for carrying out repairs to the well There is, therefore, no question that, as found by the Courts below, the mortgage is supported by necessity and is binding on the defendants

The only other question that arises is whether the mortgage executed by the mother as the *de facto* guardian of the minors, while the father is alive, is valid or not. The position of the *de facto* guardian under Hindu law is indeed so well established that there is no need to cite any authority for the proposition that an alienation by a *de facto* guardian, if for necessity, is binding on the minors The only question that arises therefore, in this case is whether where there is a legal guardian, an alienation by a *de facto* guardian will be valid Both the father and the mother are natural guardians of their minor children. There is no doubt that if a contest arose as between the father and the mother as to who should be the guardian of the minors, then it would be the father who would be the guardian Therefore the question is whether even where there is a father for the minors alive, the mother can acting as *de facto* guardian of the minors, alienate their property for necessity Authorities seem to favour the view that she can The earliest case is the one reported in *Arunachala Reddi* v *Chidambara Reddi*[1] In that case there was a testamentary guardian appointed for the minor But the minor's mother alienated the minor's property. It was held that the alienation of minor's estate made by the natural and *de facto* guardian will be valid if for necessity, notwithstanding that there was a testamentary guardian in existence (especially where such testamentary guardian had acquiesced in the alienation). In this case also the father has attested the mortgage deed and the management of the property having all along been with the mother, the father should also be deemed to have acquiesced in the mortgage In *Kundan Lal* v. *Beni Prasad*[2], the mother of the minors was alive But for some reason or other she did not function as a guardian and their estate was managed by their uncle An alienation made by him was held valid Reliance was placed, on behalf of the appellant, on the decision reported in *Narayanan Nambudri* v. *Ravunni Nair*[3], In that case it was held that a step-mother who was managing the household and looking after the minors had no right to mortgage the properties of the family for family necessity In fact, at page 689, it is mentioned that it was not contended that the *de facto* guardianship of the step-mother gave her any right to mortgage the estate. This decision has been criticised and differed from by a Bench of this Court in the decision reported in *Vamulapalli Seetharamamma* v. *Maganti Appiah*[4]. Referring to the decision in *Nambudri's case*[3], it was said as follows:

> "I would take leave to say that if the parties were governed by the Hindu law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld."

At page 776, it is mentioned that :

> "Alienations by *de facto* guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was *per se* void, apart from any question as to whether it was for legal necessity or not"

In that judgment the decision in *Ganjayyo* v. *Ramaswami*[5], where it was held that the natural mother was a "lawful guardian" for the purpose of section 21 of

1 (1902) 13 M L J 223
2. (1931) 137 I C. 115
3. (1924) 47 M.L J. 686.
4. (1926) I L R. 49 Mad. 768 at 774. 50 M L.J. 689.
5. (1913) 24 M.L.J 428

the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act, was also noticed. This decision in *Ganjayya* v. *Ramaswami*[1], may well be compared with the decision already referred to and reported in *Arunachala Reddi* v. *Chidambara Reddi*[2]. It has been finally held that *Seetharamamma's case*[3].

"... ..... the right of a *de facto* guardian to deal with the property of a Hindu minor has been recognised by our Courts ever since the decision of the Privy Council in *Hanuman Persaud Panday* v. *Mst. Babooee Munraj Kunweree*[4], provided the alienation was for necessity."

Thus it is amply clear that even when there is a legal guardian in existence, any alienation of minor's property by a *de facto* guardian would be valid if it is for necessity. It follows that the decision of the lower appellate Court upholding the mortgage to the extent of Rs. 900 which it held was for necessity is valid. This second appeal is therefore dismissed. There will be no order as to costs.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The Trustees of the Port of Madras .. *Petitioner**

v.

The Dunlop Rubber Co. (India), Ltd. .. *Respondent.*

Madras Port Trust Act (II of 1905), section 110—Interpretation—No section of the Limitation Act of 1908 excluded under—Section 15 (2) of the Limitation Act, if will apply.

Since section 110 of the Madras Port Trust Act, 1905, contains no words of express exclusion of the sections of the Limitation Act, the period of limitation in section 110 has to be construed, as though it were the period prescribed by the Schedule to the Limitation Act of 1908, and section 15 (2) of the Limitation Act will apply.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the decree of the Small Cause Court (F.B.) Madras in N.T.A. No. 258 of 1961, S.C.S. No. 6862 of 1960, Small Cause Court, Third Judge, Madras.

V. V. Raghavan and *D. V. Sivagnanam*, for Petitioner.

S. V. B. Row and *G. V. B. Gopalaswamy*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—The only point involved in this civil revision proceeding is the interpretation of section 110 of the Madras Port Trust Act, 1905, in the context of the admitted facts of the case. Section 110 of the Madras Port Trust Act is in the following terms:

"No suit or other proceeding shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof nor after six months from the accrual of the cause of such suit or other proceedings."

The question of interpretation that arises is whether the two limbs or clauses of the section should be interpreted cumulatively or disjunctively. In other words, if any suit filed after six months from the accrual of the cause of such suit is explicitly barred under the second limb of the above section, would a plaintiff be barred who gave notice of his suit within the six months, but who desires to exclude the

1. (1913) 24 M.L.J. 428.
2. (1902) 13 M.L.J. 223.
3. (1925) 50 M.L.J. 689 at p. 698 : I.L.R. 49 Mad. 768 at 779.
4. (1856) 6 M.I.A. 393 at 412.

* C.R.P. No. 920 of 1962. 16th October, 1967.

period of such notice, namely, one month, in the computation of the period of limitation? The matter may be one of some difficulty, if this section stood alone. But, actually this section has to be read in the light of certain section of the Limitation Act of 1908 and the result of that is to place the matter beyond doubt. The plaintiff is entitled by virtue of the application of the relevant sections of the Limitation Act to the problem of the interpretation of the terms of section 110 cited above, to exclude the period of notice, namely, one month, in computing the limitation period of six months.

Turning to the Limitation Act section 15 (2) states that—

"In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded."

The vital question is, will this principle apply in the entirety of its terms to section 110 of the Madras Port Trust Act, or must that section be interpreted as a compact and self-sufficient code of limitation, for actions instituted against a statutory body like the Port Trust? The relevant section here is section 29 (2) of the Limitation Act, under which the provisions of section 3 apply, so that the period of limitation prescribed by any special or local law has to be deemed to be the period of limitation prescribed by the Schedule to the Limitation Act. Further, the provisions contained in sections 4, 9 to 18 and 22 shall apply But the application is limited to this extent, namely, "to the extent to which, they are not expressly excluded by such special or local law."

In the result, therefore, since section 110 of the Port Trust Act contains no words of express exclusion of the sections of the Limitation Act, the period of limitation in section 110 has to be construed, as though it were the period prescribed by the Schedule to the Limitation Act, and section 15 (2) will apply In this view, the suit in the present case was in time and the revision petition instituted by the Port Trust will have to be rejected.

My learned brother has dealt with this matter in *Trustees, Madras Port* v. *M. C. Industries*[1], where he has considered, in detail, the argument that section 110 of the Madras Port Trust Act, is a self-contained and compact code of limitation and that section 29 (2) of the Limitation Act will not therefore apply. That argument has been repelled there, for reasons shown. The same view was taken by Venkatadri, J in *Trustees, Madras Port* v. *Simpson & Co.*[2] and the learned Judge held that the period of one month relating to the notice could be excluded by a plaintiff in computing the period of limitation for the suit itself, namely, the period of six months from the date of accrual of the cause of action The matter seems to have been come up for consideration in the Bombay High Court also in *Chhaganlal Sakarlal* v. *President, Thana Municipality*[3], and the learned Judges observed that the effect was "not to alter the period of limitation, but to alter the date from which limitation is to be calculated" The principle has been affirmed by their Lordships of the Supreme Court in *Vidyacharan* v. *Khubchand*[4], and the Supreme Court held that section 29 (2) of the Limitation Act will apply, wherever a special or local law contains no words of exclusion.

Following these clear precedents, therefore, we hold that the revision petition has no merits and it is accordingly dismissed. No order as to costs.

V M.K. *Petition dismissed.*

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1. I.L R. (1967) 3 Mad. 605 : (1968) 1 M.L. J. 162 : A.I R. 1967 Mad. 109.
2. (1967) 2 M.L J. 67 : A.I.R. 1967 Mad. 194.
3. I.L.R. (1932) 56 Bom. 135 : A.I.R. 1932 Bom. 259.
4. (1964) 6 S.C.R. 129 : A.I.R. 1964 S.C. 1099.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

Dharma Udayar .. *Appellant**

v.

Ramachandra Mudaliar .. *Respondent.*

Hindu Succession Act (XXX of 1956), section 14 (1) and (2)—Scope—A Hindu widow getting a limited right to the enjoyment of the income under the partition, but the estate not a widow's estate—Section 14 (1) if operates to make the widow a full owner.

In the present case *M* lost her husband prior to the Hindu Women's Right to Property. The only right she had then was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. Her brothers-in-law and father-in-law could have contented themselves with making regular money payments and if required charging a certain property for maintenance But when they partitioned the estate among themselves they set apart a property giving her a life estate pure and simple, the property reverting to the sons on her death. The estate given to the widow for the maintenance was restricted. to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What she got under the partition was not the qualified estate of a Hindu female known as a widow's estate or a woman's estate. If follows that the estate given to the widow under Exhibit A-1 fell under section 14 (2) of the Hindu Succession Act and section 14 (1) did not operate on the estate and make the widow a full owner. The fact that in the present case *M* was also a party to the document would not make any difference to this result.

Appeal against the decree of the Sub-Court, Vellore, in A.S No. 395 of 1962 preferred against the decree of the District Munsif, Arni, in O.S. No. 155 of 1960.

R. Rajagopala Ayyar, for Appellant.

P. C. Parthasarathy, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in the suit is the appellant There were three brothers: Ponnuswami, Munuswami and Govindarajulu They were the sons of one Thandavaraya. On 19th June, 1917, Thandavaraya, his two sons, Munuswami and Govindarajulu and Manonmani, the widow of Ponnuswami, entered into a partition which is evidenced by Exhibit A-1. The defendant is the son of Munuswami. Govindarajulu executed a will Exhibit A-2 on 12th August, 1931, in favour of his sister, Ammakannu, who settled the properties on the plaintiff under Exhibit A-3, dated 25th January, 1960 The question that arises is as to the effect of the partition deed Exhibit A-1.

According to the plaintiff Govindarajulu got a vested remainder in respect of the properties given to Manonmani under Exhibit 1 and therefore the plaintiff is entitled to the properties settled on him. According to the defendant, however, the effect of Exhibit A-1 is to give an absolute right to Manonmani and he is entitled to the properties as Manonmani's husband's heir.

To Exhibit A-1, as already mentioned, Thandavaraya, his two sons, Munuswami and Govindarajulu, and Manonmani, the widow of a predeceased son, were parties. The defendant contends that the property has been allotted to the four people for their shares and they got absolute title. We are concerned only with the question as to what Manonmani got under this document. I am unable to accept the argument on behalf of the defendant that Manonmani got an absolute title. The document merely says that Nos 3 and 4 to that document i.e., Munuswami and

* S.A. No. 1108 of 1963. 29th November, 1967.

Govindarajulu, could sell or gift the properties which fell to their share It does not say that there is no objection to any of the parties to the document alienating the properties which fell to their respective shares This is clear also from the fact that Thandavaraya and his wife were merely to enjoy the properties given to them for their life, and Munuswami and Govindarajulu were to pay the kist on those lands. The further provision that Nos. 3 and 4, that is, Munuswami and Govindarajulu were to have separate pattas also emphasises the fact that after the lifetime of Thandavaraya as well as of Manonmani, it is Govindarajulu and Munuswami that got the properties. There is no provision for transfer of patta either to Thandavaraya or to Manonmani In respect of the properties given to Manonmani the provision was that she was to enjoy the properties for her life and that after her Govindarajulu and Munuswami were to get these properties. The fact that in respect of the properties given to Thandavaraya as well as to Manonmani, it is provided that Govindarajulu and Munuswami were to perform their funeral ceremonies and take their properties does not mean that it is a condition precedent to their taking their share and that therefore Govindarajulu having died before Manonmani would not be entitled to a share in the properties given to Manonmani Quite clearly what was created under this document in favour of Thandavaraya and Manonmani was merely a life interest and there was a gift over in respect of both those properties in favour of Govindarajulu as well as Munuswami. Therefore what Munuswami and Govindarajulu got was a vested remainder and Govindarajulu was competent to execute the will, Exhibit A-2.

In *Narayana* v *Subbayya*[1], it has been held that where a person made a disposition of property in favour of his wife by means of a will and the will provided that the son should get the property after performing the obsequies of the mother, in whose favour the disposition was made and no provision was made in the will for the enjoyment of the property in case the son should die before performing the obsequies it was held that the condition of performing the obsequies was not a condition precedent and the son got a vested interest in the property.

I do not think that the decision in *Perianayakiamma* v *Ratnavelu Mudaliar*[2], is of any help to the defendant. The provision of the will in that case was quite different. There the testator gave certain properties to his daughters providing that they should have no power to make a sale, gift, mortgage etc. and that after them their issues shall use and enjoy them from son to grandson with power of gift mortgage, exchange and sale It was therefore held that a son of one of the daughters who had predeceased his mother took nothing under the will. The interpretation placed upon the document was that it was a condition precedent to any estate vesting in the daughter's son that he should survive his mother.

On the other hand in *Pavani Subbamma* v. *Anumala Rama Naidu*[3], one '*B*' left a will at his death disposing of his properties by which the widow should enjoy the properties and after her lifetime the properties should be taken by the son's daughter and the daughter's It was held that since in the will the gift over to the grandchildren was of the entire properties and not a mere gift by way of defeasance it indicated that the prior gift in favour of the widow was only of limited interest and that the provision in the will giving express powers to the grandchildren of gift, sale etc., undoubtedly would indicate the intention of the testator to draw a distinction between the powers of the widow and those of the grandchildren and therefore the widow took only a limited interest.

In *Ramachandra* v. *Jagadiswara*[4], the document executed by a husband provided as follows " that property shall devolve upon "*B*" or his legal heir and "*B*" or his legal heir shall become the absolute owner of my property on the death of my wife." It was held that the interest of "*B*" was contingent and not vested and came to an end on his death during the lifetime of the widow. This is because he

1. A.I.R 1929 Mad 32.
2. (1924) 47 M.L.J. 310.
3. (1937) 1 M L J 268.
4. A I R. 1937 Pat. 247.

got the right only on the death of the widow and there was no limitation on the interest that the widow got unlike the present case where the widow's interest is made a clear life interest.

In *Subramania Chettiar* v *Lakshman Chettiar*[1], it was held that where there is a life estate given to a person the remainder vests on the death of the testator in the remainder-man unless there are very clear words to show that the testator had a contrary intention on the language used in the will It is thus clear that what Manonmani took was only a life interest and Govindarajulu and Munuswami got a vested remainder Nor can I accept the argument that on Govidnarajulu's death Munuswami got the whole of the property on the ground that both of them got with the right of survivorship *inter se*

The next argument on behalf of the defendant was that Manonmani got a widow's estate under Exhibit A-1, and that as a result of the Hindu Succession Act, 1956 the limited interest which she got under Exhibit A-1 became an absolute interest and that therefore the plaintiff would not be entitled to get the suit property. This contention again is without substance. The effect of section 14 of the Hindu Succession Act has been very clearly discussed by Natesan, J., in *Thatha Gurunadha Chetti* v. *Thatha Navaneethamma*[2], in which appears the following paragraph:

"No doubt property given to a female in lieu of maintenance either before or after the Act, becomes her absolute property under sub-section (1) Sub-section (2) has engrafted an exception and while considering sub-section (1), sub-section (2) cannot be overlooked. Where the acquisition by the female of the property is in any of the modes prescribed in sub-section (2) and the acquisition is itself of a restricted estate, such an estate is not enlarged Sub-section (2) makes it clear that it is not the intention of the Legislature to grant full ownership to a Hindu female who gets the property under a gift, will, or other instrument and the instrument itself in express terms gives her only a limited right or restricted estate in the property All the clauses of section 14 must be read and interpreted one with the other, with section 14 and with the other provisions of the Act, and thus read, clearly section 14 is not intended to override lawful terms in contracts and bargains or bequests or gifts Certainly, it is not and it cannot be contended that the object of section 14 is to put a Hindu female in a better position than a Hindu male where the gift or bequest or other instrument as a matter of construction of the document confers only a restricted estate Section 14 (1) of the Act only removes disabilities imposed by the personal law of the Hindus as to the quality or the extent of the estate taken by the female in certain circumstances, generally found in inherited properties, properties given to her in partition and by interpretation in properties devolving on her without specification of her estate therein. The Act is both an amending and codifying Act and in the definition of property in section 14 of the Act, it will be seen included not only property in which the female Hindu would have a limited estate but also properties which she would hold as full owner even before the Act For sub-section (2) to apply, it is an essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title in the property. If she has an existing right in the property, the interposition of an instrument will not affect the operation of sub-clause (1) on the property If the instrument, be it a decree or order or award, or deed of partition merely declares the pre-existing title of the Hindu woman to any particular property sub-section (2) would not take the property out of the coverage of sub-section (1). Where a female Hindu takes property under an instrument of the kind specified in sub-section (2) and not by virtue of any antecedent legal right or title in the property, any restriction placed on the property would have its full effect".

Again at page 458 occurs the following paragraph :

1. (1940) 1 M L J 817
2. (1967) 1 M.L.J. 454 at p. 456 : I.L.R. (1968) 1 Mad 56.

"The first defendamt in this case lost her husband prior to the Hindu Women's Right to Property Act, 1937. The only right that she then had under the law was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. The sons could have contented themselves with making regular money payment and if required charging certain properties for the maintenance amount But when they partitioned the estate among themselves, they set apart property giving her a life estate pure and simple in the property, the property to revert to the sons on her death. The estate given to the widow for her maintenance was restricted to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What she got under the partition was not the qualified estate of a Hindu female known as woman's estate or widow's estate. She was not even a party to the partition deed as partition could be had only between persons having pre-existing proprietary rights in the property It follows that the estate given to the widow under the instrument of partition fell under section 14 (2) of the Act, and section 14 (1) did not operate on the estate and make the widow a full owner In the circumstances, any alienation by the widow cannot enure beyond her lifetime."

In the present case, also Manonmani lost her husband prior to the Hindu Women's Right to Property Act. The only right she had then was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. Her brothers-in-law and father-in-law could have contented themselves with making regular money payments and if required charging a certain property for maintenance. But when they partitioned the estate among themselves they set apart a property giving her a life estate pure and simple, the property reverting to the sons on her death. The estate given to the widow for the maintenance was restricted to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What she got under the partition was not the qualified estate of a Hindu female known as a widow's estate or a woman's estate. It follows that the estate given to the widow under Exhibit A-1 fell under section 14 (2) and section 14 (1) did not operate on the estate and make the widow a full owner. The fact that in the present case Manonmani was also a party to the document would not make any difference to this result.

Thus the judgment of the Courts below is correct and this second appeal is dismissed with costs. No leave

V.M.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

V. Danmull Sowcar .. *Petitioner**

v.

Syed Ali Mohamed .. *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (iii)—*Landlord claiming possession of the non-residential building for carrying on partnership business—Landlord's claim if should be for his exclusive business under section* 10 (3) (*a*) (iii).

In the present case, the respondent-landlord owns the premises and wants possession of the same for carrying on a partnership business. He is not claiming possession of any partnership property, but his own property. Section 10 (3) (*a*) (iii) of the Madras Buildings (Lease and Rent Control) Act, 1960, does not

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* C.R.P. No 750 of 1965 15th February, 1968.

require that the claim for eviction by a landlord should be for his exclusive business.

Petition under section 25 of Act (XVIII of 1960) praying the High Court to revise the order of the Small Cause Court, Madras in H R.A. No. 1130 of 1964-H R.C. No. 1172 of 1963 Rent Controller, Madras.

T. R. Ramachandran and *K Chandaramouli*, for Petitioner.

C. K. Kamala Devi, for Respondent.

The Judgment of the Court was delivered by

Sadasivam, J.—Petitioner is a tenant of a non-residential building 6, Davidson Street, G.T. Madras, owned by the respondent The respondent got an order for eviction on his application before the Second Additional Rent Controller, Madras who held that the respondent who is the owner of the non-residential building, does not own any other non-residential building other than the one leased to the petitioner and that he *bona fide* required it for his business, as the managing partner of the Mishba Transport Corporation and the said order for eviction was confirmed by the appellate authority. The petitioner has come up to the Court in revision.

Veeraswami, J, before whom the petition came up for a final disposal, considered that the question, whether one of the partners of a firm who is the owner of a non-residential premises could apply for eviction of the tenant occupying the same on the ground that he required it for carrying on his partnership business, should be decided by a Bench, having regard to the conflict of approach to the fundamental principle and in order to have an authoritative decision to guide the Rent Controllers.

The decision in this case has to be made on the interpretation of section 10 (3) (*a*) (iii) of the Madras Buildings (Lease and Rent Control) Act, 1960, hereinafter called the Act, which runs as follows.

"In case it is any other non-residential building, if the landlord or his son is not occupying a non-residential building in the city, town or village concerned which is his own."

On the finding of the Courts below, which is not and could not be disputed, the respondent is the owner of the premises, 6, Davidson Street, G.T, Madras, occupied by the petitioner as tenant. The respondent requires the premises for his partnership business. On a plain reading of the sub-section quoted above it is clear that it covers the claim of the respondent for eviction.

The learned Advocate for the petitioner incidentally argued that the respondent is carrying on his business in his own premises. But what the sub-section quoted above prohibits is a claim for eviction by a landlord in occupation of any other non-residential building In the present case, the respondent is carrying on his partnership business, namely, keeping lorries for transport of goods in the compound of his *residential* building, and his claim for eviction cannot, therefore, be negatived by virtue of anything contained in the above sub-section. In fact, the petitioner has not taken any such plea before the Rent Controller, or the appellate authority or even in the grounds of revision.

In *Sha Rikhabdas Amritlal* v. *Venkata Subbiah Chetti*[1], the question that arose was whether the partners of a firm, who required a building which they had purchased, for the purpose of carrying on business of their own which they were carrying on in a rented premises, could apply for eviction under section 10 (3) (*a*) (iii) of the Act. Venkatadri, J, held that the application was maintainable and that it was necessary that the building should be required for the applicants' exclusive business. He rightly quoted with approval the following passage with regard to the construction of the word 'own' appearing in *Firm Ranjikla & Co.* v. *Vithal Pondurang*[2], to negative the contention that a landlord applying for eviction for carrying on a business should do so for his exclusive business only :

1. I.L R. (1964) 2 Mad. 380 : (1964) 2 M.L J 132. 2. A I.R. 1952 Nag 312.

"Persons who have entered into partnership with one another are called individually partners and collectively "a firm" and the name under which the business is carried on is called the firm name It is settled law that a firm is not a separate legal entity and the firm name is a compendious way in which the business of the partners is carried on. Each partner carried on business for himself as principal and also as an agent for the other partners. Mutual agency is an essential condition of partnership. It must therefore be held that the landlord himself is carrying on the wholesale business in aluminium. The learned Counsel relying on the words 'his own' contends that the business must be the exclusive business of the landlord. There is no warrant for such a construction. As it has been held in *V. M Deshmuky* v. *K. M. Kothari*[1], it would appear that what is meant by the word 'own' is something in which the landlord or his family have pecuniary interest".

The learned Advocate for the petitioner relied on the decision in *Limchwe Htow* v. *Lutyaw Tat*[2], which was also referred to and distinguished by Venkatadri, J., in the above judgment. It was held in the Rangoon case that because a landlord has a third share in the partnership and the partnership proposes to occupy part of the premises for purpose of its business, the premises cannot be regarded as being required for occupation by the landlord himself within the meaning and intention of section 10 of the Rangoon Rent Act. Venkatadri, J., has observed that evidently, the decision was based on the interpretation of the provisions of the Rangoon Rent Act and hence the decision will not help in the interpretation of the Madras Act. There is really no discussion of any principle in the Rangoon case. It appears from the decision that it turned on a question of fact whether the landlord reasonably and *bona fide* required the premises for his occupation. Further, the decision related to the claim by one of the partners of a firm for possession of a partnership property in the possession of a tenant for his separate business. It should be noted that no partner can claim any share in a partnership property before dissolution. The case is clearly distinguishable from the facts of the present case where the respondent-landlord owns the premises and wants possession of the same for carrying on a partnership business. The respondent in this case is not claiming possession of any partnership property, but his own property. It is true that he requires possession of the premises for business in which he is a partner. But as already pointed out, the section does not require that the claim for eviction by a landlord should be for his exclusive business.

The definition of 'partnership' in section 4 of the Indian Partnership Act closely follows, that in the English Partnership Act and is as follows —

"Partnership is the relation between persons who have agreed to share the profits of business carried on by all or any of them acting for all."

In *Laxminarayan* v. *C.I T*, *Nagpur*[3], it has been held that the word "persons" in section 4 of the Partnership Act contemplates only legal persons, natural or artificial, and that a firm is not a person. It is pointed out in the decision that English lawyers do not recognise a firm as an entity district from the members composing it and that the Indian partnership law is based on the English law. This principle has been reiterated in *Narayanappa* v. *Bhaskara Krishnappa*[4] and the nature of the interest of a partner in a partnership property during the subsistence of the partnership and after its dissolution is clearly indicated.

The learned Advocate for the petitioner relied on the observations of Ramaprasada Rao, J., in *Saifuddin Hussainboy* v. *Burma Cycle Trading Co*[5]. The petition for eviction in that case was filed by four partners of a firm Saleh Brothers, which was not registered in respect of a property belonging to the firm. The

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1. A I R. 1959 Nag 51.
2. A I R 1924 Rang 277.
3. (1967) 19 S T C 317.
4. (1966) 2 S C J. 490 : (1966) 2 An.W.R (S C) 60 : (1966) 2 M L J (S C) 60 (1966) 3 S.C R 400 · A I R. 1966 S C. 1300
5. (1967) 80 L W 94 at 98 : (1967) 1 M L J. 294 I L R (1968) 3 Mad 320

claim was negatived on the main ground that it is an accepted principle of law that no proceeding can be instituted by an unregistered partnership against any person The learned Judge, however, made some observations more in the nature of *obiter dicta* on the question whether the requirements of two only of the four landlords for the possession of a premises for a business of their own was maintainable. He found that under section 10 (3) (*a*) (iii) of the Act, it could not be said that all the petitioners are entitled to the possession of the building within the meaning of the above sub-section and that the petition for eviction was not maintainable on that ground But this decision is really based on the sifting of the evidence in that case and the conclusion that the landlords of the premises in that case, though *prima facie* are the four petitioners in that case, in reality and in the eye of the law they represent an unregistered partnership which owns the premises, and therefore it is the requirement of an unregistered partnership that had to be considered in that case. In fact Veeraswami, J., has in *T.N.K. Govindaraju* v. *Dulabdass & Co.*[1], expressed a contrary view. In that case, a firm purchased a property, the purchase really being by its partners and let it out. One of the partners of the firm required the premises for his own occupation and the firm represented by him applied under section 10 (3) (*a*) (i) of the Act for eviction of the tenants. Veeraswami, J., was of the view that the words " the landlord " will cover not only a single or sole landlord, but also one of the joint landlords and where the property is owned by the partners constituting a firm and one of them requires the building for his own occupation it will squarely fall within the ambit of section 10 (3) (*a*) (i) of the Act.

In *Baker* v. *Lewis*,[2], the relevant clause of the statute which had to be considered provided as follows :—

> " the dwelling house is reasonably required by the landlord ....for occupation...... for (*i*) himself or (*ii*) any son or daughter of his over 18 years of age; and (*iii*) his father or mother ".

The County Court Judge thought that in that section the word ' landlord ' referred to only one person and had no application where two joint owners were claiming possession and for that reason, he refused the plaintiff's possession. But relying on section 1 of the Interpretation Act, 1889 it was held in that case that "joint owners can be a landlord " within the meaning of the above clause. It has been held in that decision that if an owner wishes to obtain possession and to take with him into the house persons who are residing with him, but do not come within the provisions of the statute, the Judge, in deciding the other points which arise in the case, ought to take into consideration the fact that there are people living with the owner in his present premises whom he does not wish to turn into the street. Somervell, J., who also concurred with the judgment, guarded himself by stating that he did not imply or suggest that the clause referred to above is only applicable in the case of joint owners where they are both desiring the dwelling house for occupation as a residence for all of their number. He was inclined to take the view that it has a wider application and that it would cover the case where, *A*, *B* and *C* being joint owners, put forward a claim for possession, alleging that the residence is required for occupation as a residence of *A*. Asquith, L J , has held in that decision that where there are two or more joint beneficial owners the words " for himself" in the relevant clause should be read as " themselves". In *Mc Intyre* v. *Hardcastle*[3]. the decision in *Baker* v. *Lewis*[4], was considered and it was held that where there were two or more joint beneficial owners, possession of a dwelling house could be obtained only if the dwelling house was required for occupation as a residence for both or all of them. The claim in that case was made by two joint owners on the ground that one of them required the house in the possession of the tenant for occupation as a residence for herself and the claim was negatived.

Thus on a strict view it could be contended that where there is more than one landlord the application for eviction of a tenant from the premises, should be for

1. (1967) 2 M L.J. 465.
2. L R (1947) K B 156 . 62 T L.R 716: (1946) 2 All E R. 592.
3. L.R (1948) 2 K B. 82 (1948) 1 All E R 696
4. L R (1947) K.B. 186 : 62 T L R 716 : (1946) 2 All E R. 592.

the purpose of occupation by all the landlords. The observations of Ramaprasada Rao, J., support this view. But the other interpretation that the landlords can apply for possession of the premises leased to a tenant even when one only among them requires it for his occupation expressed by Veeraswami, J., appears to be bit strained, but could be justified on the ground that we are dealing with expropri. tory legislation which restricts the rights of owners to get possession of their property from their tenants and a generous construction in keeping with the underlying spirit of the enactment is permissible. It is really unnecessary to go into the correctness of these decisions as they do not strictly arise for consideration in this case.

For the foregoing reasons, we accept the finding of the Rent Controller and the appellate authority that the respondent is entitled to obtain an order of eviction on the ground that he required the non-residential premises for carrying on his partnership business. The civil revision petition is therefore dismissed with costs.

V M.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T. RAMAPRASADA RAO.

Subba Gounder .. *Petitioner**

v.

Palaniathal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 39, rules 7 and 8—Scope—Appointment of a Commissioner under Order 39, rule 7—If can be made ex parte *without notice to the other side*

The duty to give notice before appointment of a Commissioner under Order 39, rule 7, is a matter within the discretion of the Court. It cannot be laid down as a principle of law that a Commissioner under the rule can be appointed only after notice to the other side Each case has to be decided on its own merits and Courts are expected to be vigilant in conceding the request for appointment of a Commissioner, bearing in mind that it becomes a duty to so appoint, if the exigencies of the case require. The two questions that arise for consideration are as to when a Commissioner can be appointed and how such appointment has to be made. Both aspects have to be concurrently satisfied before a Court can exercise jurisdiction under Order 39, rule 7. There may be exceptional circumstances under which the Court may dispense with notice to the other side if the sole criterion for such an *ex parte* order is the preservation of rights of parties. Appointment of a Commissioner under Order 39, rule 7 after notice as contemplated under rule 8 is the normal rule. *Ex parte* order is no doubt an exception and Courts are not totally bereft of their jurisdiction to make such an order.

But in the instant case the exercise of such permissive and enabling provision appears to be not proper.

A Commissioner under Order 39, rule 7, can only be appointed for the detention, preservation or inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein and not in respect of any property which is completely alien to the subject-matter of the suit or to any such question arising therefrom.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Coimbatore in I.A. No. 1791 of 1966 in O S. No. 484 of 1966.

T R. Ramachandran, for Petitioner.

T. K. Subramania Pillai, for Respondent.

*C.R P. No 495 of 1967 27th February, 1968.

The Court delivered the following

JUDGMENT.—The petitioner, the husband, is canvassing in this civil revision petition the correctness or propriety of the order of the lower Court in appointing a Commissioner *ex parte* under Order 39, rule, 7, Civil Procedure Code, in a maintenance action filed by the wife against him. The respondent wife as plaintiff alleges:

> " Since my separate residence as aforesaid I have been demanding of my husband separate maintenance through my father and other interested persons at the rate of Rs. 500 per mensem, but my husband is evading to do so.
>
> My husband is possessed of first class garden lands of an extent of 7 valams, worth not less than Rs. 2 lakhs and yielding an annual net income of Rs. 20,000.
>
> Besides my husband is also having money dealings to the tune of not less than Rs. 1,50,000 yielding annual interest of Rs. 18,000."

In order to ascertain the total value of her husband's business activities, which according to the plaintiff are not correctly reflected in the account books of the petitioner, the respondent sought for the appointment of a Commissioner even without notice to him to seize certain documents so that they may not be secreted later. The lower Court appointed a Commissioner *ex parte* and it is reported that the Commissioner has done his part and inventoried several valuable securities and submitted a list thereof to Court pursuant thereto. Mr. T. R. Ramachandran for the petitioner, argues that the order of the lower Court suffers from not only a patent material irregularity but it has been passed without jurisdiction. Mr. T. K. Subramania Pillai, appearing for the respondent, argues contra.

An application under Order 39, rule 7, is provided for in chapter entitled " Temporary injunctions and interlocutory Orders " of the Civil Procedure Code. Any order that a Court can pass under Order 39, rule 7, is generally governed by Order 39, rule 8, which appears to be a supplement to the earlier rule.

Order 39, rule 6, Civil Procedure Code, enables the Court, on an application of any party to a suit, to appoint any person to sell movable properties which is subject to decay and which is the subject-matter of the suit. Such person appointed is terminologically called a Commissioner. Even so, Order 39, rule 7, *inter alia* provides that the Court on the application of any party to a suit has the power to authorise any person to enter upon any property which is the subject-matter of the suit and in the possession of the other party and pass such feasible orders as are necessary for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein. Such a person appointed is also called a Commissioner. But Order 39, rule 8 (1) and (2) read as under.—

> " 8. *Application for such orders to be after notice.*—(1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.
>
> (2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance."

In the fasciculus of such language and content of Order 39, rules 6, 7 and 8 it is for consideration whether a Commissioner can be appointed under this rule without notice to the other side. If such an appointment is made, is it without jurisdiction? This leads us to the interpretation of Order 39, rule 8. *Prima facie* the language used gives a discretion to Courts to give notice to other party. The words used are " the order may be made." The word " may " used by the Legislature in juxtaposition to the word " shall " adopted in the other sections, orders and rules of the Code of Civil Procedure is significant and indicates that the word is potential in scope and not necessarily signifying any obligation. The word is enabling and permissive. In the words of Cotton, L.J., in *In re, Baker Nichols* v. *Baker*[1].

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1. L.R. (1944) Ch. D. 262, 270.

"It never can mean 'must,' so long as the English language retains its meaning; but it gives power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may' it becomes his duty to exercise it."

The Supreme Court in *Province of Bombay* v *Kushaldas*[1]. observed

"The authorities show that in construing a power the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation."

The *locus classicus* on this subject are the words of Earl Cairns, L.C in *Julius* v. *Lord Bishop of Oxford*[2].

"But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so"

Therefore the duty to give notice before appointment of a Commissioner is a matter within the discretion of the Court as no such duty is compulsorily coupled with the exercise of such a right to be exercised by the Courts. If in the circumstances of a given case, the Court finds that legal rights are in jeopardy and failure of justice is imminent if no Commission is appointed *ex parte* then the power is exercised in favour of the applicant so that the subject-matter of the suit or as to any question which may arise therein may be preserved, detained and inspected. Mr. T. R. Ramachandran, invites my attention to the decision *Sengotha* v. *Ramasami*[3]. That case arose under section 499, Civil Procedure Code, which is similar to Order 39, rule 7 of the present Code. Section 500 therein is in *pari materia* with Order 39, rule 8 of the present Code. While considering the scope of the appointment of a Commissioner before summons was served on the defendant, the Court held that:

"an application for an order under section 499 can only be made by a plaintiff after the summons has been served and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. The term 'may' must be read with the term 'at any time' and does not import that it is competent to a plaintiff to apply before service of summons or to evade the conditions of service."

The above order obviously was passed because on the merits the application before the learned Judges was not supported by any affidavit of facts. In those circumstances the Court was prompted to make the above observation. I do not think that *Sengotha* v. *Ramasami*[3], lays down that in all cases wherein the plaintiff establishes as a matter of fact that the appointment of a Commissioner is necessary in view of imminent circumstances attending upon the particular case, no Commissioner should be appointed *ex parte*. In fact, Gentle, J., in *Chidambara* v. *Nataraja Mudaliar*[4], was of the view that an application for the appointment of Commissioner is maintainable immediately after the filing of a petition for leave to sue *in forma pauperis* and before leave has been granted. Order 39, rule 7, enables a litigant to apply for the appointment of Commissioner or for such other interlocutory orders in case the subject-matter of the suit has to be preserved and inspected and for the due safeguarding of his vested rights. Order 39, rule 8, on the other hand is supplementary to Order 39, rule 7 in that it enables the plaintiff or the defendant to the action to ask for the appointment of a Commissioner or for an interlocutory order even after the institution of the suit. But once the suit has been instituted, Order 39, rule 8 prescribes that such an order has to be made generally after notice. As pointed out in *Sengotha* v. *Ramasami*[3], the word "may" has to be read in conjunction with "at any time" appearing in Order 39, rule 8. In my view, if an application is made by the plaintiff or the defendant for the appointment of a Commis-

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1 (1950) S C J 451 (1950) S C R 621 : (1950) 2 M L J 703 A.I R 1950 S C 222 at 262.

2. L.R 5 A.C. 214, 222

3 I.L R (1883) 7 Mad 241.

4 I.L R (1938) Mad 1060 (1939) 1 M.L J. 96 : A.I.R. 1939 Mad. 80.

sioner after the institution of the suit and after process for service has been applied for and issued then there may be force in the contention of Mr. T. R. Ramachandran, on the ratio of *Sengotha* v. *Ramasami*[1], that such orders have to be passed after hearing the other side. But in a case where the application for appointment of a Commissioner or for the passing of an interlocutory order is made contemporaneously with the institution of the suit, then the Court has the power under Order 39, Rule 7, to appoint a Commissioner or to pass an interlocutory order as the case may, if the circumstances of the case require and if for any other just and sufficient cause it is desirable to do so.

The permissive form of the power given to Courts in Order 39, rúle 8 (1) and (2), Civil Procedure Code, is significant It is made optional because the Legislature wanted to clothe Courts with jurisdiction, but it expects that it should not be lightly used and abused. There may be compelling circumstances which prompt the Court in a given case to use the power without notice to the other side This can be done as justice should not only be done but seem to be done and in cases where the right is coupled with a duty I am unable therefore to agree as a principle of law that a Commissioner, under Order 39, rules 6 and 7, Civil Procedure Code, can be appointed only after notice Each case has to be decided on its own merits and Courts are expected to be vigilant in conceding the request for appointment of a Commissioner, bearing in mind that it becomes a duty to so appoint, if the exigencies of the case require. The two questions that arise for consideration are as to when a Commission can be appointed and how such appointment has to be made. Both aspects have to be concurrently satisfied before a Court can exercise jurisdiction under Order 39, rule 7. There may be exceptional circumstances under which the Court may dispense with notice to the other side if the sole criterion for such an *ex parte* order is the preservation of rights of parties. Appointment of a Commissioner under Order 39, rule 7, after notice as contemplated under Order 39, rule 8, is the normal rule. *Ex parte* order is no doubt an exception and Courts are not totally bereft of their jurisdiction to make such an order. Ramaswami, J., in *Moosakutti In re*[2], while considering the purport of Order 26, rule 9, observed as follows.—

> " The issue Commission can be made *ex parte* and in fact it stands to common sense has often got to be made *ex parte*. It will be borne in mind that this application has been filed along with the plaint and before the issue of suit summons. This application is made on account of urgency. If a Commission is not going to be issued until the defendant appears most often there will no point in taking out a Commission. ...."

Venkatarama Aiyer, J., in the unreported C.R.P. No. 398 of 1952 was of the same view. In the unreported C.R.P. No. 627 of 1950, Raghava Rao, J., held a slightly different view basing his conclusion on the ratio in *Sengotha* v. *Ramasami*[1]. But it is not known as to what the facts and circumstances in that case were. This therefore need not detain us.

In fact, a Division Bench of the Bombay High Court in *Totaram* v. *Duttu*[3], took the view that:

> " In cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court before proceeding under Order 39, rule 7, can always appoint a receiver or grant an injunction *ex parte*."

I am, therefore, unable to accept the general and unqualified contention of Mr. T. R. Ramachandran, that without notice to the other party, the Court cannot act and appoint a Commissioner *ex parte*. I do not think that the ratio in *Sengotha* v. *Ramasami*[1], supports such an extreme contention. But in the instant case, the

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1 I.L.R (1883) 7 Mad 241.
2 (1953) 1 M.L.J. 632 : (1953) 66 L.W. 418
3. A.I.R. 1943 Bom. 143.

exercise of such permissive and enabling jurisdiction by the Court below appears to be not proper. The circumstances as disclosed are not so grave and the incidents relied on are completely alien to the subject-matter of the suit, which aspect will be presently adverted to.

Therefore it cannot be said that in order to subserve any vested right of the applicant, the Commissioner was appointed by the lower Court I am of the view that the Court below, in the peculiar circumstances of the case, erred in appointing a Commissioner *ex parte* on this ground alone. What the petitioner was attempting to do was to fish for information by prospecting the alleged subterranean activities of her husband. This is a pure speculation not connected or related to the suit and not even intended to effectuate any legal right which the plaintiff is supposed to possess.

The order of the lower Court cannot even be sustained on another ground. Mr. T. R. Ramachandran rightly contends that a Commissioner can only be appointed for the detention, preservation or inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein and not in respect of any property which is completely alien to the subject-matter of the suit or to any such question arising therefrom. It is not in dispute that the suit filed by the wife was only for securing maintenance of a sum of Rs 500 per month as against her husband who refused to maintain her. In fact, a charge decree has been asked for in the plaint over the immovable properties of her husband and not as against any other business assets of his. That this is the prayer is not in dispute. In such circumstances, what is the subject-matter of maintenance action as filed by the respondent in the lower Court. It cannot be said by any stretch of imagination that the business assets over which no charge has been asked for and which has absolutely no bearing, impact or relation to the subject-matter of the action, can be said to be either related to or connected with such subject-matter of the pending litigation. In the Hindu Adoptions and Maintenance Act, an inclusive definition of "maintenance" is given and it runs as follows :—

"'Maintenance' includes in all cases, provision for food, clothing, residence, education and medical attendance and treatment."

This is primarily the subject-matter of the suit. No doubt, the respondent, in order to secure the necessary relief asked for, is seeking for a charge decree over the immovable property of her husband so that ultimately she could work out her rights as and when she secures a decree in her favour. It should not however be overlooked that the subject-matter of the suit, as the plaintiff herself described, cannot be the other business assets of her husband as she has not even asked for a charge decree over them. She has of course asked for such a decree on the immovable properties of her husband. Though strictly the properties described in the schedule to the plaint may not be subject-matter of the suit as is ordinarily understood, because of the specific prayer in the plaint that a charge decree should be passed over such properties set out in the schedule, it might be conceived that such properties might form part of the subject-matter of the suit. In the absence of a similar prayer in respect of the other business assets of the husband, even this extension cannot possibly be conceived of. In my view, it cannot be said that in this action the business assets of the husband can ever come within the scope, meaning and content of the expression "subject-matter of the suit or as to which any question may arise therein." I have already expressed the view that the petitioner was attempting to fish out information and dig at the alleged illegal activities of her husband. She characterises such business activities of her husband as intended purely to evade tax. These allegations, however strong and however vituperative they may be, cannot make such business assets of the husband the subject-matter of suit. It cannot be said that such assets for which a Commissioner has been

appointed by the lower Court have any relation to the claim for maintenance which is the primary and only relief asked for by the respondent in the lower Court. Mr. T. K. Subramania Pillai however contends that in order ultimately to ascertain and quantify the maintenance allowance which she may secure if she succeeds in the suit, such business assets of the husband should be treated and deemed to be the subject-matter of the suit as well. I am unable to agree Wanchoo, C J., and Dave, J , in *Ramaswarup* v. *Mst. Kesar*[1], took the view that Courts are not authorised to pass an order on the application of one party to make a search of the documents which might be in the possession of the opposite party, and then detain them by saying that a question might arise about them in the suit. The Supreme Court in *Padamsen* v. *State of Uttar Pradesh*[2], held that Order 39, rule 7, applies only to the subject matter of the suit. In this case, the documents, the promissory notes and other valuable securities have been inventoried by the Commissioner pursuant to the warrant of commission issued by the lower Court. Such an inventory obviously relates to something which does not form the subject-matter of the suit. The lower Court therefore had no jurisdiction to issue a Commission to effectuate the above purpose. The order of the lower Court is therefore set aside and the civil revision petition is allowed with costs.

V.K. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Chinnappa Gounder and another .. *Appellants**

v.

Valliammal ... *Respondent.*

Hindu Succession Act (XXX of 1956), section 6 proviso and section 8—Maintenance deed executed in favour of widow prior to coming into force of the Act by manager of joint family—Widow suing for partition by virtue of the right acquired under the Act—If bound to return property covered by maintenance deed.

Under the Hindu Law, prior to the enactment of the statutory provisions, a manager of a joint Mitakshara family was under a legal obligation to maintain all male members of the family, their wives and their children On the death of any one of the male members he is bound to maintain his widow and her children, the obligation to maintain these persons arising from the fact that the manager is in possession of the family property.

Where therefore prior to the coming into force of the Hindu Succession Act of 1956, a maintenance deed in respect of certain joint family properties was executed in favour of a widow by her father-in-law, in discharge of his obligation as the manager of the joint family under the Hindu law as stated above, the widow could not be compelled to return the properties covered by the maintenance deed before she could sue for partition by virtue of the right conferred under the proviso to section 6 read with section 8 of the Hindu Succession Act, 1956. The contention that the widow cannot retain the properties covered by the maintenance deed and also ask for partition is untenable. The Act effects a basic and fundamental change in the Hindu law of succession and the right to succession conferred on the various persons mentioned in the Schedule to the Act are not subject to any disqualification.

1. A I R 1958 Raj 218
2 (1961) 2 M L J (S C) 22 · (1961) 2 An W R (S C) 22 . (1961) M.L J (Crl) 405 : (1961) 2 S C J 79 (1961) 1 S.C.R. 884 · A I R 1961 S C. 218.

* S.A. No. 637 of 1964. 10th April, 1968.

Appeal against the Decree of the Court of the Subordinate Judge (Additional) Erode, in A.S.No. 178 of 1962 preferred against the decree of the Court of the District Munsif of Erode in O.S. No. 357 of 1961.

N. Sivamani, for Appellants

V. S Rangaswami Ayyangar, for Respondent.

The Court delivered the following

JUDGMENT —The two defendants in O.S. No. 357 of 1961 on the file of the Court of the District Munsif of Erode are the appellants before this Court and the plaintiff in the suit is the sole respondent. The respondent's husband Perianna Gounder and the first appellant were brothers and the second appellant is their sister. Perianna Gounder died in 1944 Subsequent to his death, on 16th August, 1944, Periathambi Gounder, father-in-law of the respondent and the father of deceased Perianna Gounder and the appellants, executed a document described as a maintenance deed in favour of the respondent in respect of two items of the property. That document recited that when the respondent requested her father-in-law to give her maintenance, at the instance of mediators, he executed the said document. The document also stated that she should reside in one of the items which was a house and should cultivate at her pleasure the other item which was a piece of land and enjoy the income therefrom for her life towards her maintenance without any power of alienation by way of mortgage, *othi* or sale and on her death, the two items of property should belong to her father-in-law and his heirs. It is stated that the father-in-law himself died in 1960 Thereafter, the respondent instituted the suit out of which the second appeal arises for partition of her one-fourth share in the suit properties and for separate possession of the same. I must straightaway mention that the suit properties are one-half of the properties belonging to the joint family It is conceded before me that the respondent is entitled to one-fourth share of the suit properties by virtue of the proviso to section 6 read with section 8 of the Hindu Succession Act of 1956. The reason is that though the father-in-law of the respondent and the first appellant constituted a Hindu undivided family, by virtue of the provision contained in the proviso to section 6 of the Hindu Succession Act, 1956, his undivided interest in the joint family properties would devolve by way of succession and will not go by way of survivorship. If that be the case, his interest in the property was divisible as between the respondent, daugher-in-law, the two appellants, son and the daughter and his own widow However, the appellants herein contended that she cannot ask for a partition of her one-fourth share of the properties and at the same time retain the properties covered by the maintenance deed of 16th August, 1944, and she must make the properties got by the said document available for partition in the suit, since the appellants also have a share in the said properties The Courts below rejected this contention and decreed the suit of the respondent. Hence the present second appeal by defendants 1 and 2 in the suit.

Mr. N. Sivamani, learned Counsel for the appellant contended that the respondent herein cannot retain the properties covered by the maintenance deed and also ask for partition of her one-fourth share, in the suit properties and if she wants partition of one-fourth share, she must surrender those properties and make the same available for partition in the suit itself. Mr. Sivamani frankly concedes that there is no direct authority with reference to the position after the coming into force of the Hindu Succession Act of 1956 ; nor is there any specific provision in the said Act which will have the effect he contends for. At the same time, the learned Counsel submits that on the analogy of the position prevailing under the Hindu Women's Right to Property Act, 1937, under the Hindu Succession Act also, the respondent can have either the properties given to her for maintenance or have a share in the properties granted to her by the provisions contained in the Act of 1956 and she cannot have both. I may point out here that the position as it stood prior to the Hindu Succession Act of 1956, is clear and does not admit of any doubt. A Bench of this Court in *Rathinasabapathy* v. *Saraswathi Ammal*[1], pointed out that there is

1 (1953) 2 M.L J. 459 · A.I R. 1954 Mad 307.

nothing in the Hindu Women's Right to Property Act, 1937, which has the effect of compelling the three widows for whom provision was made under that Act to sue for a partition at the risk of losing the right to maintenance which they had under the Hindu Law and stated that the option was with the widow either to claim maintenance to which they were entitled under the Hindu Law or to ask for partition under the provisions of the Hindu Women's Right to Property Act, 1937, but not to have both The principles enunciated by that decision were approved by another Bench of this Court in *Gajavalli Ammal* v. *Narayanaswami*[1]. The appellants in that case were the widow and daugher of one Govindaswami Mudaliar who had left a son by his first wife who was the respondent to the appeal. The said Govindaswami Mudaliar died on 21st November, 1953, and at the time of his death he and his son Narayanaswami (respondent) were members of a joint Hindu family. The suit was brought for partition and possession of a half share in the family properties as the share due to the first appellant who claimed her husband's share under the Hindu Women's Right to Property Act, 1937. On behalf of the second appellant a maintenance provision was claimed and marriage expenses also were asked for. The claim of the appellants was resisted on the strength of a settlement deed, dated 7th December, 1953. It was pleaded by the respondent that the said settlement was effected in full settlement of all the claims against her husband's joint family properties and consequently she could not sue for partition. The learned Judges of this Court came to the conclusion, on the basis of the evidence and the circumstances of the case, that by arrangement embodied in the settlement deed and by the acceptance of the properties given in the settlement deed, the widow had given up her right to claim half share in the joint family properties under the Act of 1937. In this view, they accepted the case of the respondent and rejected the claim of the appellants for partition of a half share in the properties. In dealing with this question the learned Judges observed as follows : (at page 189)

> " What the position would be by reason of the enactment of the Hindu Succession Act, 1956, is not a matter arising for our consideration now. The limited question we are called upon to decide is whether the settlement deed was the result of a claim for maintenance alone and consequently we would be justified in concluding that the acceptance of the settlement deed did not imply the giving up of the right to partition and claim a share under the Act of 1937."

Mr. Sivamani, learned Counsel for the appellants, relies on the first sentence quoted above and states that the learned Judges left open the question as to what would be the position under the Hindu Succession Act, 1956, and the position under the Act will be the same, that is, the widow (in this case, the daughter-in-law) will be entitled either to a share in the properties or to maintenance but not to both.

In my opinion, the sentence relied on by the learned Counsel for the appellants does not lend support to any such contention On the other hand, the said sentence may lead to a contrary inference. As far as the provisions of the Hindu Succession Act are concerned, there is no provision either express or implied which will have the effect of terminating or putting an end to an interest created in an immovable property in favour of a person like the respondent herein in discharge of an obligation resting on the father-in-law of the respondent. A reading of Exhibit B-1, namely, the document styled as maintenance deed of 16th August, 1944, makes it clear that a life interest was created in favour of the respondent. Under the Hindu Law, prior to the enactment of the statutory provisions, a manager of joint Mitakshara family is under a legal obligation to maintain all male members of the family their wives and their children ; on the death of any one of the male members, he is bound to maintain his widow and his childern, the obligation to maintain these persons arising from the fact that the manager is in possession of the family property. The maintenance deed of 16th August, 1944, was executed by the father-in-law of the respondent in discharge of this obligation imposed upon him under the Hindu Law. It may be that if the Hindu Succession Act had not been passed, the respondent might not have any right to file a suit for partition of share in the properties retain-

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1 I L R (1962) Mad 204. A I R 1962 Mad. 187

ing at the same time the properties obtained by her by virtue of this maintenance deed. However the position is not the same with reference to the provisions contained under the Hindu Succession Act, 1956. The said enactment effects a basic and fundamental change in the Hindu Law of succession and the right to succession conferred on the various persons mentioned in the Schedule to the Act are not subject to any qualification such as the one contended for before me. As a matter of fact, in relation to an Act like the Hindu Succession Act of 1956, which is both an amending and codifying statute, regard should be had only to the clear language contained in the Act. Mr. Sivamani himself frankly conceded that he is not able to lay his hands on any particular provision contained in the statute in support of his contention. In the absence of any express provision contained in the Act providing for the termination of the interest created in favour of a person like the respondent by way of maintenance due to her under the law then in force, I am unable to accept the contention of the learned Counsel that the necessary consequence of the respondent filing a suit for partition to claim her right under the provisions of the Hindu Succession Act, 1956, is to bring about a termination of the life interest created in her favour under the document, dated 16th August, 1944. If such an interest has not been created by the time when the Hindu Succession Act, 1956, came into force and the respondent was merely receiving maintenance from her father-in-law out of the joint family properties, the position may be different. But, when the right to receive maintenance which the respondent undoubtedly had, has crystallised in the form of creation of life interest in her favour, I am unable to find any principle or authority for holding that that interest automatically comes to an end as soon as she files a suit for partition for recovering her share of the properties under the provisions of the Hindu Succession Act, 1956. I must also point out that it is not the case of the learned Counsel that the Act itself has got the effect of terminating the interest created in favour of the respondent and it is only her conduct in filing the suit for recovering her share which has got such an effect. The learned Counsel bases this contention on the analogy of the position that resulted from the provisions contained in the Hindu Women's Right to Property Act, 1937. In my opinion, there is no comparison whatever and there can be no analogy between the rights which the three widows had under the Hindu Women's Right to Property Act, 1937, and the right which the various heirs get under the Hindu Succession Act, 1956, and therefore there is no justification whatever for importing the position under earlier Act by way of analogy into the position under the 1956 Act.

Mr. Sivamani drew my attention to the provisions contained in the Hindu Adoption and Maintenance Act, 1956, and particularly to sections 19, 21 and 22. Section 19 of that Act deals with the right of daugther-in-law to obtain maintenance from her father in-law and the circumstanes and the extent to which such a right can be enforced. As far as the present case is concerned, such a question does not directly arise. It is not a case where the respondent having obtained her share pursuant to the Act of 1956, is seeking to obtain maintenance by virtue of the provisions contained in the Hindu Adoption and Maintenance Act, 1956, with reference to the right which the respondent claims in the present suit.

Mr. Sivamani relied on a decision of the Bombay High Court in *Mellappa* v. *Guramma*[1]. In that case a number of alienations were challenged and two of them were alienations effected in favour of two female members. In a suit for partition, the learned Judges took the view that they cannot retain the property covered by the said alienations and at the same time seek to recover a share under the provisions of the Hindu Women's Right to Property Act, 1937. The learned Judges stated as follows :—

> " The result is that although defendant 3 cannot challenge the deeds Exhibits 368 and 372 in the sense mentioned above, since defendants 1 and 2 are now given a share in the family property, defendants 1 and 2 cannot retain the property under the two deeds, Exhibit 368 and 372 and, at the same time, claim a share in the family property "

1. A.I.R. 1956 Bom. 129 at 138.

No reason have been given for the said conclusion. Probably the reason was the same as has been referred to by the two Bench decisions of this Court already mentioned by me. However, that being a decision prior to the Hindu Succession Act, 1956, Mr. Sivamani cannot derive any assistance from that decision in support of his present contention. Mr. Sivamani also drew my attention to the fact that this decision of the Bombay High Court has been affirmed in appeal by the Supreme Court in *Guramma* v *Malappa*[1]. There again the view of the Judges of the Bombay High Court refer ed to by me already was not challenged and as a matter of fact the correctness of that position was conceded. In view of this, independent of the judgment of the High Court, the decision of the Supreme Court does not afford any guidance or lend any support to the argument of the learned Counsel.

Mr. Sivamani wanted to argue that the properties covered by the deed dated 16th August, 1944, being the joint family properties, the father-in-law of the respondent had no right to make a gift of the same to the respondent. Mr. Sivamani, however, frankly stated that such a point was not raised before the Courts below nor even in the grounds of appeal before this Court, but contended that as a point arising on the face of the document it could be urged by him before this Court. Apart from the fact that such a point was never put forward before the Courts below, I am of the opinion that there is no substance in the said contention also. In the first place, the transaction evidenced by the document, dated 16th August, 1944, cannot be said to be a gift. I have already mentioned the legal position that a manager of a Hindu joint family is bound to maintain all the members of the coparcenery as well as their wives and their children. Therefore, on the date when the said document was executed, the respondent had a right to be maintained out of the family properties and only in discharge of the corresponding obligation, the said document was executed. Therefore, in my opinion, the document did not constitute a gift and consequently it is not open to the objection put forward by the learned Counsel. Mr. V. S. Rangaswami Iyengar, learned Counsel for the respondent, points out that it is not open to the appellants to put forward such a contention because they themselves have affirmed the transaction evidenced by the document in the written statement filed in this case and their only case was that while the respondent claims a share in the properties, she should surrender the properties obtained by her under the document and that it was not their case that the document itself was void or inoperative. I see considerable force in this argument also. In any event, as I have already indicated the transaction evidenced by the document dated 16th August, 1944, cannot be said to be a gift and therefore is not open to the challenge put forward by the learned Counsel for the appellants.

No other question has been urged in this appeal.

Under these circumstances, the Second Appeal fails and is dismissed. There will be no order as to costs.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Paramasami Pillai .. *Appellant**

v.

Sornathammal and others .. *Respondents.*

Hindu Marriage Act (XXV of 1955), *section* 12—*Marriage with sexless or impotent person —Validity—Declaration of nullity of marriage—Who can ask for.*

Civil Procedure Code (V of 1908), *section* 35—*Question arising one of considerable difficulty—Parties asked to bear their own costs—Propriety.*

The Hindu Law has vastly changed and the idea of Hindus has also changed with the times. Whatever might have been the position at a time when the

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1. (1964) 4 S C.R. 497 : A I R. 1964 S C. 510.

* S.A. No. 1385 of 1963 and Memo. of objections. 18th July, 1967.

marriage was said to be a *samskara* and it was therefore considered that marriage was not merely for the purpose of sexual intercourse, in the context of the enactment of the Hindu Marriage Act, which provides for declaration of nullity of marriage as well as for divorce, it is no longer possible to say that marriage with a sexless or impotent person is valid

Conflict in case law discussed.

It must however be noticed that the distinction between a void contract and voidable contract would not be applicable to the case of a marriage and even in a case where the marriage is a nullity it would be necessary for the party complaining of nullity of the marriage to get a declaration of nullity from Court

A declaration of nullity of marriage can be asked for only by either party to the marriage and not by a third party and in any case after the death of one of the parties nobody can question the validity of the marriage.

The question that arises in this case is one of considerable difficulty as it has not been decided by this Court so far. In the circumstances the decree of the lower appellate Court ordering both parties to bear their own costs is correct

Appeal against the decree of the District Court, Madurai, in A S. No. 288 of 1961 preferred against the decree of the Sub-Court, Madurai in O.S. No. 81 of 1957.

R. Gopalaswami Iyengar and *K N Balasubramaniam*, for Appellant.

V. K. Ramaswami, for Respondents.

The Court delivered the following

JUDGMENT —This second appeal arises out of a suit filed by the appellant claiming to be the reversioner to the estate of one Deiva Pandian who died issueless on 6th July, 1957, for setting aside a sale deed executed by Deiva Pandian in favour of the first defendant in the suit and for recovery of the suit properties. On an objection taken by the first defendant, the third defendant was added as a party to the suit on the ground that she was widow of Deiva Pandian's father and as such entitled to his estate The plaintiff contended that the third defendant was not a woman at all, that therefore there could be no valid marriage between her and Deiva Pandian's father and that consequently she was not Deiva Pandian's father's widow. The trial Court held that the marriage between the third defendant and Deiva Pandian's father was valid It also held that the plaintiff was not the reversioner to Deiva Pandian's estate, that the sale deed executed by Deiva Pandian in favour of the first defendant was executed for consideration, and that it was not executed because of fraud and undue influence, and dismissed the suit The lower appellate Court came to the conclusion that the sale deed executed by Deiva Pandian in favour of the first defendant was not supported by consideration, and that therefore it would not be valid On the question of the validity of the marriage between the third defendant and Deiva Pandian's father, it held that the third defendant was a sexless person and though it was disposed to hold that the marriage between her and Deiva Pandian's father could not be valid it felt bound by the authority to hold that there was a valid marriage, and that in any case the question of the validity of the marriage between the third defendant and Deiva Pandian's father was one which could have been raised only by Deiva Pandian's father and not by third parties like the plaintiff In the result it dismissed the plaintiff's appeal

I think the finding of the lower appellate Court that the third defendant was a sexless person is correct In effect it means that the third defendant was not a woman The third defendant refused to submit herself to a medical examination and it is in evidence that Deiva Pandian's father married Deiva Pandian's mother after he had married the third defendant, apparently because the third defendant was unfit for sexual intercourse The third defendant had described herself as *Ali* and it was also in evidence that she had no breasts She did not menstruate either, the admission by P W 1 that the third defendant had a hole cannot be held to mean that she had a vagina. What could be seen is a cleft rather than a hole.

On the whole I am satisfied that the conclusion of the lower appellate Court that the third defendant was not a woman is correct.

The next question that arises is whether the marriage between her and Deiva Pandian's father was valid. The argument on behalf of the plaintiff is that a marriage can be only between persons of opposits sex, that one of them must be a male and another a female, and that unless the third defendant was a female there could be no valid marriage between her and Deiva Pandian's father and the marriage would be a total nullity For this proposition the plaintiff (appellant herein) relied upon the decision in *A.* v. *B* [1], where, Tendolkar, J., after an elaborate discussion of all the Sanksrit texts bearing on the subject held that such a marriage would be absolutely null and void under the Hindu Law. The learned Judge criticised the opinion of Mayne's Hindu Law, 10th edition on the ground that Mayne did not have all the Sanskrit texts presented to him He also criticised the decision in *Bhagwati Saran Singh* v. *Parameswari Nandan*[2], and that of a Full Bench of this Court in *Amirthammal* v. *Vallimayil Ammal*[3] Both the decisions were criticised on the ground that they placed great reliance upon the opinion of Mayne. The decision of the Calcutta High Court in *Ratan Moni Debi* v. *Nagendranarain Singh*[4], was accepted as correct by the learned Judge and he stated that the decision would be reinforced by the various texts that he himself had cited in his judgment. In the Calcutta case it was held that a wife whose husband was impotent at the time of marriage and had never been able to consummate the marriage was entitled to a decree for nullity of marriage. As against this, reliance was placed by the respondents on the decision in *Smt. Ramdevi* v *Rajaram*[5], *Kantilal* v. *Vimla*[6], and *Mallareddy* v. *Subbamma*[7]. In *Kantilal* v. *Vimla*[6], the Court held valid a marriage with a person whom it described as an impotent and sexless woman and whose genital organs were said to be not at all developed and who was said to have no ability to perform the sexual act and be an active party to coitus. In that case the woman had very rudimentary development of the internal organs and the secondary sex characteristics were not at all developed. She had not been menstruating at all. This decision followed the Full Bench decision of this Court in *Amirthammal* v. *Vallimayil Ammal*[3], The decision in *Mallareddy* v. *Subbamma*[7], holds that though the marriage of an impotent person is condemned as reprehensible and improper, still if the marriage had been performed and solemnised with the customary rites and ceremonies, it will be deemed to be valid, that the marriage is not void *ab initio* but only voidable, and that so long as the wife does not choose to get the marriage annulled under section 12 of the Hindu Marriage Act, she is entitled to be maintained by her impotent husband.

There is no doubt that under English law a marriage such as the one under consideration would be held to be null and void. It does not seem to be correct to distinguish between void and voidable marriages in this connection. Under the ordinary law of contract if the contract is void, it could be treated as nullity and any other remedy sought without having to set aside that contract. But in respect of marriages even when the marriage is null and void, it cannot be so held at the instance of third parties, a declaration of nullity can be asked for only by either party to the marriage and in any case after the death of one of the parties nobody can question the validity of the marriage. Nor can any relief be asked for on the bas is that the marriage does not subsist. So resort to a Court is necessary to declare a marriage null and void and no relief can be claimed without asking for such a declaration. For the purpose of this case what I have already said about the third defendant not being fit for normal sexual intercourse would make her an impotent person and therefore such marriage would be null and void in English law.

Under ancient Hindu Law an examination of the various Sanskrit texts relating to this question shows that though marriages of impotent persons as well as

1. A I R. 1952 Bom 486.
2. I L R (1942) All 548
3. (1942) 2 M L J 292 I L R. (1942) Mad 807 (F B)
4. I L R (1945) 1 Cal 407
5. (1963) All L J 658
6. A I R 1952 Sau 44
7. (1956) An W R 590 A I R 1956 Andh 237

lunatics and idiots were deprecated, they were not held to be invalid One of the reasons usually given in those texts is that it was possible for an impotent person to raise a child through his wife by the practice of *niyoga* that is, through an appointed kinsman But this practice of *niyoga* has long since become obsolete. While a lunatic or an idiot may be quite capable of sexual intercourse and therefore of producing children, an impotent person is not so capable. That is the reason why the earlier texts seem to have particularly referred to the case of an impotent person and the practice of *niyoga* Since the practice of *niyoga* has now become obsolete, to say that the marriage of an impotent person would be valid is not in consonance with the modern idea. The Hindu law has vastly changed and the idea of Hindus has also changed with the times Whatever might have been the position at a time when the marriage was said to be a *samskara* and it was therefore considered that marriage was not merely for the purpose of sexual intercourse, in the context of the enactment of the Hindu Marriage Act, which provides for declaration of nullity of marriage as well as for divorce it is no longer possible to say that marriage with an impotent person is valid With great respect to the learned Judges who have taken the other view, I prefer to follow the opinion of Tendolkar, J , in *A* v *B* [1] and that of the Calcutta High Court in *Ratan Moni Devi* v *Nagendranarain Singh*[2], I hold therefore that the third defendant's marriage is not a valid one as she was an impotent person.

The question still remains whether even though the marriage of the third defendant with Deiva Pandian's father might not be valid that question can be raised in this suit The importance of this question is because if the third defendant were held to be the widow of Deiva Pandian's father the plaintiff's suit has to fail on that account alone. On the question Mulla has taken the view in his principles of Hindu Law, 12th Edition at page 843 thus —

> " The question, as to impotency, cannot be raised by a third person, because, it is solely a personal matter for the spouses, nor can it be raised after the death of one of them "

In *Malla Reddy* v *Subbamma*[3], already referred to Viswanatha Sastry, J , has also taken the view that the marriage with an impotent person is not void *ab initio* and that so long as the wife does not choose to get the marriage annulled under section 12 of the Hindu Marriage Act, she is entitled to be maintained by her impotent husband I have already said that a distinction between a void contract and voidable contract would not be applicable to a case of marriage and even in a case where the marriage is a nullity it would be necesary for the party complaining of nullity of the marriage to get a declaration of nullity from Court. The above opinion of the learned Judge supports the view taken by Mulla With respect, I agree with that view Originally under the Hindu Law if a man found that he had married a person who was not a woman and therefore unfit for sexual intercourse, it could be open to him to take another wife But as there was no provision in that law for any declaration of nullity of marriage, the wife continued to be a wife and there was no possibility for the husband to take steps to see that she could no longer have the status of the wife But under the Hindu Law which is applicable at present, a husband who finds himself in such circumstances can ask for a declaration of invalidity of the marriage and after getting such a declaration he can marry another wife. Therefore, the law obtaining in England as to the necessity for a husband to obtain a decree of nullity and preventing any other from raising the question of nullity of a marriage except the parties to the marriage should be held applicable to the Hindus in this country also under the law at present I am therefore of opinion that the conclusion arrived at by the lower appellate Court that the question whether the third defendant was the widow of Deiva Pandian's father cannot be raised by the plaintiff in this case It therefore follows that the plaintiff's suit has to fail on that account The lower appellate Court's finding that the

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1 A I R 1952 Bom 486
2. I L R (1945) 1 Cal 407
3 (1956) An W R 590 A I R 1956 Andh.

plaintiff was reversioner to Deiva Pandian's estate and that the alienation in favour of the first defendant was not supported by consideration would not affect this result.

In the result the second appeal is dismissed. The parties will bear their respective costs throughout.

A memorandum of cross-objections is filed by the respondent in respect of the costs disallowed to him by the lower appellate Court The question that arises in this case is one of considerable difficulty, as it has not been decided by this Court so far. In the circumstances, I consider that the decree of the lower appellate Court ordering both parties to bear their own costs is correct The memorandum of cross-objections is therefore dismissed. No costs. Leave granted.

V.K. ——— *Appeal and memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M NATESAN.

Sri Raja Rajeswari Bus Service, Vridhachalam .. *Petitioner* *

v.

The Regional Transport Authority, South Arcot at Cuddalore and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *sections* 47 *and* 57—*Proceedings under section* 57 (3) *without a prior determination of the n mber of permits to be granted on the route—Petitioner (fleet owner on a sector of the route) failing to make any representation under section* 57 (3) *within the prescribed time—Proceedings under section* 57 (3) *if vitiated due to absence of inquiry under section* 47 (3)

Section 47 of the Motor Vehicles Act envisages two stages of enquiry, (*i*) fixation of number of permits under section 47 (3), and (*ii*) consideration thereafter of the applications for the grant of permit and representations, if any, by persons mentioned in section 57 (3). While section 57 (3) provides for making applications for the grant of permit and inviting of representations on receipt of such applications the proviso to that subsection authorises the Regional Transport Authority to reject even summarily the applications without following the procedure laid down in the sub-section, if the grant of permit in accordance with the applications would go beyond the limits fixed under sub-section (3) of section 47. That is, if a limit has been fixed under section 47 (3) and that limit would be exceeded with the grant of permit, the Regional Transport Authority may *in limine* dismiss the applications for permit If the Regional Transport Authority without such summary rejection, proceeds to publish the applications and calls for representations, clearly it will be open to any person who would be affected to object to the grant, pointing out that the limit fixed would be exceeded Equally it will be open to the objector to state, where no limit has been fixed, that the route is well served or the condition of the road is such that more buses cannot ply on the road *etc.* all germane and relevant considerations under section 47 (1) Such representations can quite properly find a place in the representations made, when called for, under section 57 Once the objections raised and representations made call for a determination under section 47 (3), under the rulings it is incumbent upon the Regional Transport Authority to take proceedings under section 47 (3) first before embarking upon the merits of the applications under section 57

Here the petitioner has not notified his objections to the grant of permit on the route and as such sub-sections (3) and (4) of section 57 read together preclude the Regional Transport Authority from hearing the petition at the inquiry under section 57 (3). Section 57 (4) bars the authority from considering any represen-

* W.P. Nos 1055 and 1794 of 1968 and W.A No. 128 of 1968. 23rd July, 1968.

tation in connection with an application referred to in sub-section (3), unless the application is made in writing before the appointed date It is manifest that the objections now raised is a representation in connection with an application for permit contemplated in sub-section 57.

The contention that the petitioner could not, in proceedings under section 57 (3) raise objection as to want of prior determination under section 47 (3), is devoid of merits.

It was open to him to raise that point before the Regional Transport Authority as an objector, being an operator on the route. He could have raised the point at least in the alternative.

The terms of section 57 (3) and (4) of the Act preclude any party who had not notified its objections in time to be heard at any stage of the proceedings original or appellate in relation to the grant of permit on an application duly advertised under section 57 (3).

W. P. No. 1055 *of* 1968.—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of Prohibition restraining the Regional Transport Authority, South Arcot, Cuddalore, from proceeding any further with his notification in R. No. 44441/A-1/67 dated 12th January, 1968.

W. P. No. 1794 *of* 1968.—Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R. No. A-1/44441/67 dated 12th March, 1968, and quash the same.

W. A No 128 *of* 1968 —Appeal under clause 15 of the Letter Patent against the order of the Honourable Mr Justice Kailasam dated 28th March, 1968 and made in C. M P Nos. 4028 and 4215 of 1968—C M.P. No. 4028 of 1968-presented to stay all further proceedings in pursuance of the Notification of the Regional Transport Authority, South Arcot at Cuddalore in R. No. 44441/A-1/67 dated 12th January, 1968 by way of issuing and communicating proceedings granting the permit in favour of the second respondent therein pending W.P. No. 1055 of 1968 presented to the High Court under Article 226 of the Constitution of India, to issue a writ of Prohibition restraining the Regional Transport Authority, South Arcot at Cuddalore from proceeding any further with his Notification in R.No. 44441/A1/67 dated 12th January, 1968, and C M.P No 4215 of 1968, presented to vacate the interim stay granted in the said C.M P. No. 4028 of 1968

K. K. Venugopal for *V. T. Gopalan,* for Petitioner in W P Nos 1055 and 1794 of 1968 and Appellant in W.A. No. 128 of 1968.

The Government Pleader, for 1st Respondent

S. Mohan Kumaramangalam for *V. Subramanyam* and *R S Ramanujam,* for 2nd Respondent.

The Judgment of the Court was delivered by

Natesan, J.—The two writ petitions under Article 226 of the Constitution and the connected writ appeal directed against an interlocutory order in W.P. No. 1055 of 1968 vacating the interim stay granted before notice, relate to the grant of a stage carriage permit on the route Madampoondi to Ulundurpet (*via*) La-Gudalur, Rishivandiam, *etc* By a notification dated 16th December, 1967, the Regional Transport Authority, South Arcot, under section 57 (2) of the Motor Vehicles Act, invited applications for the grant of a stage carrige permit on the route. There were three applicants, for the route in question, the 2nd respondent in the writ petitions being one On 12th January, 1968, the applications were duly notified under section 57 (3) and 8th February, 1968, was fixed as the date, on or before which representations in connection with the applications should be submitted

furnishing copies thereof simultaneously to the applicants. The applications with representations were originally scheduled to be taken up for consideration on 29th February, 1968, but were adjourned to 12th March, 1968 The petitioner is a fleet owner operating 12 buses on a sector of the route in question No representations or objections to the applications entertained by the Regional Transport Authority for permit on the route in question were submitted by the petitioner within the time prescribed But, the petitioner sent a petition by registered post to the Regional Transport Authority which was acknowledged by the Regional Transport Authority on 27th February, 1968, praying that proceedings under section 47 (3) should be taken before consideration of the applications for permit on the merits Again, when the applications were actually taken up for consideration by the Regional Transport Authority on 12th March, 1968, the petitioner appeared through Counsel and submitted that consideration of the applications should be postponed, pending determination under section 47 (3). In the proceedings of the Regional Transport Authority dated 12th March, 1968, the 2nd respondent in the writ petitions became grantee From the proceedings it is seen that there was only one objector. Grant of the permit to the 2nd respondent was duly communicated to the applicants and the representator on 3rd April, 1968 The proceedings did not refer to the receipt of the petition filed by the petitioner and representation made on his behalf by his Counsel on 12th March, 1968 It is under these circumstances that the petitioner came to this Court first with W.P.No. 1055 of 1968 for the issue of a writ of Prohibition. Later, after the 2nd respondent came on the scene and represented that the permit in question had been granted to him on 3rd April, 1968, itself, the petitioner applied for amendment of the relief of prohibition into one of *certiorari* He also filed an independent application, W P No. 1794 of 1968 for the issue of a writ of *certiorari* to quash the order of the Regional Transport Authority dated 12th March, 1968.

The substantial contention of the petitioner is that there has been no inquiry under section 47 (3) and the proceedings, taken under section 57 (3) without a prior determination of the number of permits to be granted on the route in question, are vitiated It is submitted that, as the petitioner, an existing operator on the route, had specifically objected to the hearing of the applications for permit on the merits without prior determination under section 47 (3), the proceedings are void and without jurisdiction and should be quashed Reliance is placed on the decision of this Court in the batch of writ appeals and writ petitions, *Messrs Gobald Motor Service (P.) Ltd, Mettupalayam, and others* v. *The Regional Transport Authority, Coimbatore and others*[1], and W.P No. 406 of 1968 following the decision of the Supreme Court in *Jayaram Motor Service* v *S. Rajarathinam*[2], and *Lakshmi Narain Agarwal* v *The State Transport Authority*[3].

There is no dispute that, for the route in question, there has been no prior determination under section 47 (3) But the question is whether the proceedings are liable to be challenged under Article 226 and quashed at the instance of the petitioner who had admittedly made no representation under section 57 (3) within the prescribed time. It is submitted for the 2nd respondent that, not having made any representation under section 57 (3), the petitioner has no *locus standi* to be heard at the inquiry of the applications for permit on their merits, and that, therefore, he could not complain of the grant. It is submitted that it was open to the petitioner, by his representation under section 57 (8), to question the need for the grant of permit on the route Objections to the proposed grant, which would necessitate an inquiry under section 47 (3) particularly under sub-clauses (*a*) and (*f*) of section 47 (1) it is said could have been taken. Our attention was drawn to section 57 (4) which precludes consideration of any representation in connection with an application

1 W A Nos 261 to 266 of 1967 and W.P. Nos 67 and 72 of 1966

2. (1967) 2 S C W R 857 at 880

3 C A No 636 of 1967

for permit, unless the representation had been made in writing before the appointed date, simultaneously furnishing a copy thereof to the applicant. In the circumstances, it was submitted that the Regional Transport Authority acted perfectly in accordance with law in not taking cognizance of the representation sent by post, just two days before the date fixed for inquiry, and the representation made by the petitioner's Counsel at the hearing on the adjourned date The petitioner having no right of audience under section 57 (4) representation, if any, made by him it is urged were *non est.*

There can be no doubt and it has been so held following the decisions of the Supreme Court that section 47 envisages two stages of inquiry, (*i*) fixation of number of permits under section 47 (3), and (*ii*) consideration thereafter of the applications for the grant of permit and representations, if any, by persons mentioned in section 57 (3). In W A. Nos 264 to 266 of 1967 etc. in fact, we have remarked, with reference to the cases then under consideration, that the Regional Transport Authority had no jurisdiction to proceed to consider the applications for permit without a prior determination under section 47 (3) But we have to bear in mind the facts of the cases then considered The Regional Transport Authority there had invited applications for the grant of additional permits on the route. The applicants for the route, besides filing applications for the grant of permit to themselves, had also made representations under section 57 (3) objecting to the addition of new buses on the ground that the route in question was more than adequately served by the existing service. When the objections wanted the Regional Transport Authority to first fix the maximum number of permits to be granted on the route under section 47 (3), the Regional Transport Authority took the stand that orders under section 47 (3) would be passed at the time of consideration of the applications. It is in those circumstances that the petitioners came up to this Court praying for the issue of a writ of prohibition and we observed *inter alia*

> "That being so, from all aspects and angles it could be said that at any route when the existing operators or applicants call upon the Regional Transport Authority to fix the number of buses on the route, before entertaining the applications for permit, it is bound to do so under section 47 (3)."

In that batch of cases the objectors in time made due representation and demanded that there must be a prior determination under section 47 (3) They had qualified themselves to be heard at the inquiry. The decision of ours in that batch of cases may be contrasted with our decision in *K Nainippan* v. *The Regional Transport Authority, North Arcot, Vellore.*[1]

In the later case the petitioner was one of several applicants for the grant of permit on the route. On representations being called for under section 57 (3) to the applications received, the petitioner made no representation, on the applications of others, and raised no question about the need for a prior determination under section 47 (3). The principal contention in this Court for the writ petitioner was, that a determination under section 47 (3) was an essential prerequisite and a matter which went into the jurisdiction of the authority, whether the petitioner had raised any objection before the Regional Transport Authority or not as to the need for additional bus and the adequacy or otherwise of the existing facilities. In dealing with the argument, we observed —

> "Though it is a question of jurisdiction in one sense, when parties, at any rate tacitly proceed on the basis that there is no need for his fixation of limit under section 47 (3) or revision of the limit already fixed, it cannot be said that orders passed on such assumption are wholly void If any of the objectors or any applicant at least in the alternative calls for a prior determination under section 47 (3), then the objection ought to prevail before the Regional Transport Authority, and its failure to proceed under section 47 (3) first would vitiate its order. In our view, in a matter of this kind, when an objection has not been taken by any one before the Regional Transport Authority it cannot be said that the order is

1 W P. No. 406 of 1968 and W. P No. 92 of 1968.

wholly void, and that objection could be raised at any stage, irrespective of other consideration and saving features "

The contention of Mr K K. Venugopal that the petitioner could not, in proceedings under section 57 (3) raise objection as to want of prior determination under section 47 (3), is devoid of merits. In fact, in our judgment in W P No 406 of 1968 we remarked.

" It was open to him to raise that point before the Regional Transport Authority as an objector, being an operator on the route. He could have raised the point at least in the alternative "

In the batch W.A.Nos. 264 to 266 of 1967 we said :

" Applications have been called for under section 57 (2) and have been filed. Objections have been preferred and affected parties have called for a determination under section 47 (3). We see nothing in law which prevents the question of revision of the limit of stage carriages on a route being taken up even after applications have been called for and received."

It can make no difference, even if it is a case where there has been no prior inquiry at all under section 47 (3). While section 57 (3) provides for making applications for the grant of permit and inviting of representations on receipt of such applications, the proviso to that sub-section authorises the Regional Transport Authority to reject even summarily the applications without following the procedure laid down in the sub-section, if the grant of permit in accordance with the applications would go beyond the limits fixed under sub-section (3) of section 47. That is, if a limit has been fixed under section 47 (3) and that limit would be exceeded with the grant of permit, the Regional Transport Authority may *in limine* dismiss the applications for permit. If the Regional Transport Authority, without such summary rejection, proceeds to publish the applications and calls for representations, clearly it will be open to any person who would be affected to object to the grant, pointing out that the limit fixed would be exceeded. Equally it will be open to the objector to state, where no limit has been fixed, that the route is well served or the condition of the road is such that more buses cannot ply on the road etc all germane and relevant considerations under section 47 (1) Such representations can quite properly find a place in the representations made, when called for, under section 57. The rule that where an inquiry under section 47 (3) is necessary it must precede the disposal of applications for permit on their merits, does not preclude the raising of all germane objections and relevant representations within the time prescribed. Once the objections raised and representations made call for a determination under section 47 (3), under the rulings it is incumbent upon the Regional Transport Authority to take proceedings under section 47 (3) first before embarking upon the merits of the applications under section 57.

We are not impressed with the contention of Mr. K K. Venugopal that, as the legal position was not clear till the decision of this Court in W A. Nos. 264 to 266 of 1967 etc. following the decision of the Supreme Court in *Jayaram Motor Services* v. *S. Rajarathinam*[1], the petitioner could not take the objection earlier. As a matter of fact, the decision of this Court was given on 10th January, 1968 and the last date for preferring objections, called for under section 57 (3), was 8th February, 1968. Further all that we laid down, following the observations of the Supreme Court in *Jayaram Motor Service* v. *S Rajarathinam*[1]. In that, when a determination under section 47 (3) is required, an inquiry under section 47 (3) should not be telescoped with the inquiry under section 57 of the applications for the grant of permit on the merits. An enquiry under section 47 (3) may be initiated by the authority itself or duly called for by parties interested. We pointed out that, once the number of vacancies is settled, the question convassed and decided prior to the taking up of the applications for the grant of permit on the merits, it cannot again become the subject of controversy at the further stage, when the actual merits of the applications are considered.

1. (1967) 2 S C R 857 at 860.

Here the petitioner has not notified his objections to the grant of permit on the route, and sub-sections (3) and (4) of section 57 read together preclude the Regional Transport Authority from hearing the petition at the inquiry under section 57 (5). Section 57 (4) bars the authority from considering any representation in connection with an application referred to in sub-section (3), unless the application is made in writing before the appointed date. It is manifest that the objections now raised is a representation in connection with an application for permit contemplated in sub-section (3) of section 57. The objections raised to relate to considerations provided under section 47 (1). We cannot agree with the contention that the representation should be confined to the qualifications of the applicant for permit. True at the inquiry under section 57 (5) the authority is concerned only with the choice of the operator. It is pertinent in the context to remember the practice that was previously prevalent in this State on the receipt of applications for permit, referred to in our judgment in W A. Nos 264 to 267 of 1967 batch Suppose a limit has been fixed under section 47 (3) and, notwithstanding ignoring the proviso to section 57 (3), the authority, without summarily rejecting the applications, proceed further publishing the applications and calling for representations To accede to the petitioner's contention, would come to this, that it will not be open to an operator, on the route in his representation to raise even the patent objection that the grant of permit would exceed the limits. If he does not raise his objection in his representation, we fail to see how he can raise it at a later stage. The Motor Vehicles Code does not provide for an audience before the Regional Transport Authority at the inquiry under section 57 (5) to persons who had made no representations In *Purushottam Bhai Punambhai Patel* v. *The State Transport Appellate Authority, Madhya Pradesh*[1], the Supreme Court held .

" We consider that the terms of section 57 (3) and (4) of the Act preclude any party who had not notified its objections in time to be heard at any stage of the proceedings original or appellate in relation to the grant of the permit on an application duly advertised under section 57 (3)."

The decisions in *Arunachalam Pillai* v. *Southern Roadways Ltd*[2], *Taj Maaal Transport Ltd.* v *Secretary, Regional Transport Authority, Tirunelveli*[3], and *Swami Motor Transport (P.) Ltd* v *Raman and Raman*[4], relied upon by the petitioner, are clearly distinguishable and have no bearing on the question now under consideration In the present case it does not appear whether even the only representator demanded an inquiry under section 47 (3) The order of the Regional Transport Authority does not refer to any such objection from the representator We do not think that the circumstances call for any interference by us in the matter under Article 226 of the Constitution. The writ petitions fail and are dismissed As the writ appeal is from an interlocutory order in the writ petition, it fails with the writ petition and is dismissed. Rules Nisi in the writ petitions are discharged No order as to costs.

V.M.K. *Writ appeal and writs petitions dismissed.*

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1. C A No 762 of 1963
2. (1961) 1 S C J 421 · (1960) 3 S C R 764 · (1961) 1 An W R (S C) 104 : (1961) 1 M L J (S C.) 104 : A I R 1960 S.C 1191.
3. (1965) 2 M L J 453 I L R. (1965) 2 Mad. 461 : A I R 1966 Mad. 8
4. (1961) 2 M L J 127 · I L R (1961) Mad. 110 : A.I R 1961 Mad 180.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

D. Sornam, by Power-of-Attorney D.A.S. Swami .. *Appellant**

v.

State of Madras, represented by the Secretary, Health Department, Fort St. George, Madras-9. .. *Respondent.*

Civil Procedure Code (V of 1908), Order 3—Power of Attorney agent of a suitor—How far can represent the party—If can plead and seek right of audience in Court on behalf of the suitor.

Advocates Act (XX of 1961), sections 29, 32 and 33—Right of person to practice in Courts—Power of Attorney agents of parties to a suit or proceeding—If can plead on behalf of suitors before Courts.

Practice—Persons other than Advocates—Power of Attorney agent of a suitor—If can seek audience and plead before a Court on behalf of the suitor as a matter of right—Special permission of Court in particular cases—How granted.

Order 3 of the Code of Civil Procedure no doubt provides for conduct of litigation in Courts by recognised agents But it is now well settled that an appearance, application or act which a recognised agent may make or do for a party does not include the right to plead. A recognised agent of a suitor in any proceeding before Courts as such has no right of audience and cannot plead in Court.

In re, *Eastern Tavoy Minerals Corporation Ltd*, I L R. (1934) 61 Cal 24, *Krishnammal* v *Balasubramaniam,* (1937) 2 M L J. 552 I.L R. (1938) Mad. 12, (F.B.) and *A. S. Patel* v. *National Rayon Corporation,* A.I.R. 1955 Bom. 262, referred to.

Sections 29, 32 and 33 of the Advocates Act of 1961 (which repeals the Legal Practitioners Act in part and clauses 9 and 10 of the Letters Patent) provides that only Advocates are entitled to practice the profession of law. It is no doubt true that under section 32 of the Act, as under section 4 (1) (*r*) of the Criminal Procedure Code, a Court may permit any person, not enrolled as an Advocate, to appear before it in any particular case. The expression ' appear ' in that section may conceivably be given a wider interpretation and include the right to appear, plead or address the Court.

In re, *Powers of Advocates,* (1929) I.L R. 52 Mad. 92. 55 M L J. 551 and *Aswaini Kumar Ghosh* v. *Arabind Bose,* (1952) S.C J. 568 : (1953) S.C R 1 : A.I.R. 1952 S.C. 369 at 375, referred to.

But that is a special provision under which the Court is empowered in any given case to permit any person to act in that particular case and the power will have to be exercised judicially.

There is no warrant whatsoever to place a recognised agent holding general power of attorney to take proceedings in Courts, in the same position as an Advocate to whom a vakalat has been given. To do so will be to defeat the provisions of the Advocates Act and the Legal Practitioners Act and the salutory privileges, rules and restrictions that govern those who practice the honourable profession of law It is not in the interests of suitors and it is not conducive to the efficient administration of justice to permit as of right, pleading in Courts by person , on behalf of others, who are not governed by any code of professional ethics and who are not subject to any disciplinary jurisdiction in the matter of conduct of a suitor's case

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramakrishnan, dated 2nd August, 1968 and made in

* W.A No. 331 of 1968. 2nd September, 1968.

exercise of special origional Jurisdiction of the High Court in Writ Petition No 2663 of 1968 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the respondent to delete rule 1 (*b*) and (*d*) of the rules for admission into Government Medical Colleges in the State and in consequence to entertain the applications of the petitioner herein to join a Medical College either as a P.U.C. candidate or as a Science Graduate.

D. A. S. Swami, Power of Attorney, and *R. Srinivasa Iyangar*, for Appellant.

The Order of the Court was made by

Natesan, J.—The Writ Petition, the dismissal of which at the admission stage has given rise to this appeal, failed at the outset without an examination of the merits of the case for want of representation before the Court at the hearing for admission either by the Petitioner in person or by an Advocate duly authorised. A person, D.A.S. Swami, as the power of attorney holder from the Petitioner, would plead her case at the hearing for admission, and sought to do so before us at the hearing for admission of the appeal. The short question is whether this is permissible.

The actual petitioner, whose rights are agitated in the Writ Petition, is one D. Sornam, and the question involved is the rejection of her application to the Medical College as a Science Graduate on the ground that she is only a Home Science Graduate and so not qualified for admission under rule 1 (*e*) of the Rules of the Government for admission to the Medical College The Writ Petition is filed by her power of attorney holder D. A. S Swami Even the affidavit in support of the application, is sworn to by this D. A S Swami who, describes himself as a lawyer and the petitioner's power of attorney holder. He is the holder of a law degree and we take judicial notice of the fact that he has been removed from the rolls of the High Court on account of some professional irregularities. Manifestly he cannot claim to appear for a suitor as a Pleader or Advocate But it is interesting to note that the general power of attorney which has been filed in this case, describes him as a lawyer and this is a matter which we would like the Bar Council to examine, as we find that this D. A S Swami has sought appearance in Courts in more than one case as power of attorney holder for the party In this case, the Writ Petitioner is no doubt the niece of D A S Swami and she, who is very much a major, aged about 23 years, describes him as her statutory guardian after the demise of her father in 1963 But we find that, in one case referred to by D A. S Swami himself in his grounds of Writ Appeal, as power of attorney holder from an accused in a criminal case, he displaced a practising Advocate who was appearing for the accused and sought to intervene in the proceedings.

The power of attorney presented in this case runs in those terms :

"I, D. Sornam, daughter of Dr. D A Dandayuthapani B A , M B B.S , aged 23, residing at 33, Habibulla Road, T Nagar, Madras-17, hereby authorises, empower and appoint Mr D A.S. Swami, B A B L , Lawyer, agen , Supreme Court, Mr D S S Manian, B A B L., B. Com , and Messrs T J A and Co , Lawyers consisting of the former two partners only, all residing a the same address to be my agents and to represent us jointly or severally in every respect for all purposes connected with my admission as Medical student in Government and other Medical Colleges ; to take all proceedings in all Courts and before all authorities in India In ratification in writing of all the proceedings which were certainly taken at my instance by Mr D A S Swami and as my guardian under the statutory rule for such admission in W P. No 1481 of 1966 in the High Court, Madras, as well as of Writ Appeal filed against the order dated 17th April, 1968 in C M P. No. 5849 of 1968, I further authorise the said agents to file appeals against the orders dated 27th April, 1968 in W P. No 1481 of 1966 and C M P No 9701 of 1968, to file fresh W Ps. as also to sign, verify and swear to all pleadings, affidavits and other proceedings in all Courts and before all authorities, for further prosecution of all remedies whatsoever.

I hereby confirm the interest of Mr. D A S Swami as my paternal uncle and abovesaid statutory guardian from the demise of my father in 1963, and the interest of Mr. D.S S Manian as my cousin brother"

When the power-of-attorney holder sought to address us on the merits of the case, we pointed out to him that there are obstacles to his having an audience, before Court on the merits of the case, and that he may either engage an Advocate to appear in the case or ask the appellant Sornam herself to present the case as best as she can. D A S. Swami would have none of it and would claim a right to address this Court as a power-of-attorney holder of the party, authorising him to prosecute the matter in Courts. The conduct of litigation in Court by recognised agents is found provided in Order 3 of the Code of Civil Procedure Under Order 3, rule 1, any appearance, application or act in or to any Court, required to authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf By Order 3, rule 2, (*a*) persons holding power-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of parties would be recognised agents for the purpose of Order 3, rule 1 It is now well established that an appearance, application or act which a recognised agent may make or do for a party does not include the right to plead Decisions have held that a recognised agent as such has no right of audience and cannot plead in Courts. In *In re Eastern Tavoy Minerals Corporation Ltd.*[1], it was held that a Director of a company, holding a power-of-attorney, authorising him "to appear for and on behalf of the company, to conduct and represent the company in the proceedings" in High Court had no right of audience in Courts. As pointed out in Mulla's Code of Civil Procedure, 13th Edition, Volume I, at page 668, quoting Chagla, C J, in *A S. Patel* v. *National Rayon Corporation*[2], the right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses are all parts of pleading and that is not included in the expression "appearance, application or act in or to any Court". In Order 3, rule 1, Civil Procedure Code the expression 'act' is used in a technical sense and not in the comprehensive sense of any action by a party. Its meaning is limited by its being placed in juxtaposition with the words 'appearance' and 'application'. The question is found discussed at length by the Full Bench of this Court in *Krishnammal* v *Balasubramaniam*[3] The Full Bench has held that an agent with a power-of-attorney to appear and conduct judicial proceedings has no right of audience in Court.

Recently Alagiriswami, J, had to consider the question in *Meena Ammal by Power-of-Attorney D A S Swami* v. *Krishnaswami*[4], again at the instance of this D A S Swami, when he sought to argue on behalf of a certain party Meenammal as power-of-attorney agent. Following the decision of the Full Bench in *Krishnammal* v. *Balasubramaniam*[3], another Division Bench decision of this Court in L P A. (S R.) No 1363 of 1966, wherein also this D A S Swami sought audience in Court as a power-of-attorney holder and the decision of Venkataraman, J, in *D. A S. Swami* v *Kubendran*[5], the learned Judge rejected the claim of D A S. Swami to argue in Court on behalf of a party as power-of-attorney agent The Learned Judge advised the party concerned to engage an Advocate for arguing that case The claim of this D A S. Swami which Venkataraman, J, had to deal with in *D A S Swami* v. *Kubendran*[5], is in a criminal case, and the question had to be considered under the relevant provisions of the Code of Criminal Procedure But the learned Judge had, in the context to examine the position on the civil side also.

True, some of the earlier decisions referred to have discussed the matter in the light of the provisions contained in Clauses 9 and 10 of Letters Patent and in the

1. (1934) I L R 61 Cal 324
2. A I R 1955 Bom 262
3. (1937) 2 M L J 552 I L R (1938) Mad 682.
4. S R Nos 64788 to 64790 of 1967
5. (1967) 1 M L J 27 (1967) M L J (Crl) 68 A I R 1967 Mad 276

Legal Practitioners Act Clauses 9 and 10 of the Letters Patent, and parts of the Legal Practitioner's Act now stand repealed by the Advocates Act (XXV of 1961). Before referring to the Advocates Act, we may refer to Clause 10 of Letters Patent. That provided that no person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or plead for or on behalf of any suit or in the High Court, *except that any suitor shall be allowed to appear, plead or act on his own behalf or on behalf of a co-suiter* Section 10 of the Legal Practitioners Act contained the provision that, except as provided by the Act or any other enactment for the time being in force, no person shall practise as a pleader or Mukhtar in any Court not established by Royal Charter unless he held a certificate issued under section 7 and has been enrolled in such Court or in some Court to which it is subordinate. Section 8 of the Indian Bar Councils Act (also repealed by the Advocates Act) provided that no person shall be entitled as of right to practise in any High Court, unless his name was entered in the roll of Advocates of the High Court maintained under the Act It is unnecessary for us to refer to the position of recognised High Court Attorneys The Advocates Act, 1961 which is an Act to amend and consolidate the law relating to Legal Practitioners and to provide for the constitution of Bar Councils and an All-India Bar, enacts, by section 29 in Chapter IV which except for section 32 has not yet come into force that Advocates shall be the only recognised class of persons entitled to practise law The section runs thus :—

> " Subject to the provisions of this Act and any Rules made thereunder, there shall as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, Advocates ".

Section 33 [which emphasises that Advocates alone have the right to practise, reads :

> " Fxcept as otherwie provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any Court or before any authority or person unless he is entitled as an Advocate under this Act ".

The exception relevant for our purpose is provided in section 32, which has come into force from 4th January, 1963 This section which empowers a Court to permit appearance to any person not an Advocate under the Act in a particular case, runs thus :

> " Notwithstanding anything contained in this Chapter, any Court, authority or person may permit any person, not enrolled as an Advocate under this Act to appear before it or him in any particular case ".

First, this section does not recognise the right of any person other than an Advocate to claim audience in Court, secondly, this section cannot be interpreted or used to circumvent or defeat section 29 which would entitle Advocates alone to practise the profession of law. Section 45 of the Act makes practising by persons not entitled under the Act penal. The power under section 32 is vested in Courts and tribunals for special circumstances to be exercised judicially. This provision must be read in the light of similar provisions in earlier statutes, for instance, section 4 (1) (*r*) Criminal Procedure Code whereunder the Court may, in any given case, permit any person appointed to act in any proceeding in the Court But as pointed out by Venkataraman, J , in *D A S Swami* v *Kubendran*[1], previous permission of the Court is a requirement. That apart, section 32 uses the term " appear " while sections 29 and 32 use the expression 'practise' The word 'practise' includes both acting and pleading, that is, takes in all the normal activities of a legal practitioner. Though the decisions prior to the Advocates Act have held right 'to appear' and

1 (1967) 1 M L J 27 . (1967) M L J (Crl.) 68 · A I R 1967 Mad 276

'the right to plead' in Courts as distinct functions—see Clause 10 of the Letters Patent " to appear, plead or act' in the context one may construe the word. 'appear' in section 32 of the Advocates Act to mean appear, to plead or address the Court. Parliament evidently intended that the expression 'appear' under section 32 should bear a more comprehensive meaning. We can envisage occasions where a wider sense would be necessary. It is unnecessary for us to examine this question, as what is claimed here is not permission to appear as a special case, but a right to address Court on the strength of the power-of-attorney. In effect D A.S. Swami claims the right to act and plead. As a recognised agent, he can have appearance and he can act: now he wants also to plead the cause before the Court, that is factually to practice the profession of law. In *Aswini Kumar Ghosh* v. *Arabind Boss*[1], the Supreme Court approved the meaning given to the word 'practise' by Kumaraswami Sastri, J, in the Full Bench case *In re Powers-of-Advocates*[2], where the learned Judge said:

> "the word 'practise' means 'appear', act, and plead, unless there is anything in the subject or context to limit its meaning."

We cannot overlook that both in the power-of-attorney and in the affidavit in support of the writ petition, D A.S. Swami, is described as a lawyer which in popular sense means one who practises the profession of law. The Full Bench in *Krishnammal* v. *Balasubramaniam*[3], pointed out that even one isolated instance of the exercise of the related function could constitute practising The learned Judges referred to the law in England where even one isolated act has been held to constitute 'acting as a Solicitor' rendering the person guilty of such conduct, liable to be dealt with under section 26 of the Solicitors Act of 1860 for contempt of Court We see no warrant whatsoever to place a recognised agent holding a general power-of-attorney to take proceedings in Courts, in the same postion, as an Advocate to whom a vakalat has been given To do so, would be to defeat the provisions of the Advocates Act and the Legal Practitioners Act and the salutory privileges, rules and restrictions that govern those who would practise the honourable profession of law. It cannot be contended that reasonable restrictions should not be placed on those who practise the profession of law Nor can it be said that the restrictions which have been placed and the rules and regulations which now govern the practice of the profession of law are not reasonable It is not in the interest of suitors and not conducive to the efficient administration of justice to permit pleading for them in Courts as of right by persons who are not governed by any professional ethics or code of conduct and who are not subject to any disciplinary jurisdiction in the matter of the conduct of a suitor's case. We are not for giving the *imprimature* of the Court and commit suitors to self-styled lawyers who are not amenable to any professional discipline to expouse and plead their causes in Courts The Constitution does not compel us to do that The power-of-attorney holder here does not seek before us permission to represent the suitor as a special case without reference to the power that has been given to him We may at once state that, having regard to his antecedents, we may not grant it even if requested He would not avail himself of the services of any Advocate which he could do as the recognised agent of the party. He does not want time for the appellant herself to appear and plead her cause. In the circumstances we cannot but dismiss the writ appeal The writ appeal is dismissed When we were about to read the judgment Sri R Srinivasa Ayyangar represented that he was authorised duly by vakalat by the power-of-attorney agent to argue the case for admission It is also represented that the writ petition has not been gone into on the merits. In the circumstances, the writ petitioner D. Sornam may invoke the jurisdiction of this Court again and present a fresh writ petition as there has been no disposal of the case on the merits.

R M ——— *Appeal dismissed.*

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1 (1952) S C J 568 · (1953) S C R. 1 : A I R. 1952 S C 369 at 375.
2 (1929) I L.R. 52 Mad. 92 · 55 M L.J 551.
3 I L R (1938) Mad. 12 (1937) 2 M L J. 552.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR JUSTICE M. NATESAN.

T. M. Kannappa Mudaliar and others .. *Petitioners**

v.

The State of Madras represented by the Secretary to Government, Food and Agriculture Department, Fort St. George, Madras-9 and another .. *Respondents.*

Madras Agricultural Produce Markets Act (XXIII of 1959), *sections* 5, 6, 8, 18, 19 *and* 38 (2)—*Section* 5 *if requires separate market committee for each notified agricultural produce in the same notified area—Market committee deemed to be continued by section* 38 (2)—*If can be attacked as not effective or not properly constituted for the purposes of the present Act—Constitutional validity of the Act—If invalid as violating Article* 301 *or* 304 (b) *of the Constitution of India—Validity of* Explanation 1 *to section* 19 (1).

It is true that an area for the purposes of the Madras Agricultural Produce Markets Act, 1959, is declared as a notified area with reference to a specified agricultural produce and that the Government shall establish a market committee for every notified area. But it does not follow that for every notified agricultural produce there must be a separate market committee to regulate its purchase or sale in the notified area. If there are several notified agricultural produce for each of which the notified area is the same, which is permissible under sections 3 and 4, it cannot be seen why the same market committee for the same notified area cannot function and have control in respect of every one of such notified agricultural produce. It cannot therefore be contended that under section 5 there must be a market committee separately established for each agricultural produce

It cannot be said that because the market committee continued by the deeming provision of section 38 (2) is not representative unlike a market committee constituted under section 8 of the Act, the old market committee deemed to continue cannot be either legal or effective for the purposes of the 1959 Act. Sub-section (2) of section 38 not only says that the market committee established under the repealed Act (the Madras Commercial Crops Act, 1933) would be deemed to be established as a market committee under the repealing Act (the 1959 Act), but also provides that all members of the old market committee shall be deemed to be members appointed under the repealing Act, so that the sub-section clearly indicates that section 8 will have no application to such a case governed by the sub-section. There is, therefore, nothing to invalidate the deeming provision and it cannot be argued that the market committee continued by section 38 (2) is not effective or not properly constituted for the purposes of the 1959 Act.

The Madras Agricultural Produce Markets Act, 1959 is regulatory in substance and character and does not violate Article 301 of the Constitution There is therefore no need to resort to Article 304 (*b*) of the Constitution to save the Act.

It is well established that regulatory provisions which do not directly or immediately impede or burden the free movement of trade, commerce and intercourse, but provide or intend to provide facilities for trade, commerce and intercourse are not restrictions within the meaning of Part XIII of the Constitution and are compatible with the freedom of trade declared by Article 301 of the Constisution.

The distinction between a restriction and a regulation is fine but real, though the dividing line is not capable in the nature of things, of a comprehensive and a satisfactory definition The test, broadly speaking, is whether the impugned provisions lay a direct and immediate burden on the movement of trade, com-

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*W.P. Nos 711, 751, to 755, 900 and 1100 of 1964. 23rd October, 1966.

merce and intercourse or are intrinsically beneficial to and provide, in the ultimate analysis, facilities for better conduct of trade, commerce and intercourse.

If an Act is not intended as a tax measure to raise money for running the Government, nor is it intended to restrict the movement of free trade, commerce and intercourse, or in any other way place burdens or limitations on trade or free flow of trade, commerce and intercourse, but the Act is essentially designed to protect certain transactions in certain specified commodities in order to benefit their producers and in doing so, regulates purchase and sale of such goods by providing for a licensing system, market and other facilities in specified areas in order that the evils of trade through middlemen may be eliminated for the benefit of the community, such an Act will clearly be regulatory in character and in no way inconsistent with the freedom declared by Article 301 of the Constitution.

It is true that *prima facie* the provision in the Madras Act (XXIII of 1959) requiring licence appears to be prohibitory in form. But the intention and effect of this provision is not to place restraint on trade directly or immediately. The prohibition is not against any person at all purchasing or selling or carrying on business in the notified agricultural produce in the notified area; the requirement is only, to put it in a positive form, that the purchase or sale, storage weighment, pressing or processing of any notified agricultural produce should be at the place provided therefor and in accordance with the conditions of a licence.

There may be a variety of licensing systems some of which may directly be designed to impede, burden or restrain movement of trade But Madras Act (XXIII of 1959) does not fall within that category.

It cannot be said that because of the provisions in sub-section (3) of section 6, the licensing system provided by section 6 (1) is invalid as placing a restraint on freedom of trade. Nor can it be found that the levy of cess by the market committee under section 18 is intended or act as a direct or immediate restraint on trade in the notified agricultural produce. The fee is levied for the purpose of meeting the expenses in operating the regulatory provisions of the Act.

Nor has the contention any force that *Explanation* 1 to section 19 (1) is unconstitutional.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records of the State Government and the Market Committee in notification, dated 9th March, 1964 in G.O. Ms. No. 776, Food and Agriculture, declaring North Arcot District as a notified area for the purpose of Madras Agricultural Produce Markets Act, 1959 in respect of paddy and the notice of the second respondent (in Writ Petitions Nos. 711, 751 to 755 and 909 of 1964) and the notice S. No. 34132, dated 25th May, 1964 (in Writ Petition No. 1100 of 1964) respectively calling upon the petitioner to take out a licence under the Act XXIII of 1959 after paying a tax of Rs. 25 and quash the same.

V. Vedantachari, T. S Viswanatha Rao and *K. Narayanaswami Mudaliar*, for Petitioners.

Advocate-General (*S. Mohan Kumaramangalam*), Assistant Government Pleader (*S. Mohan*) and *R D. Indrasenan*, for Respondents

The Order of the Court was delivered by

Veeraswami, J.—These petitions have been heard together as they raise common points of law. The petitioner in each case is a dealer in purchase and sale of paddy in North Arcot District. By G.O.Ms No. 766, Food and Agriculture, dated 9th March, 1964, which was duly notified in the *Fort St. George Gazette*, the State Government declared that the North Arcot District would be a notified area for the purposes of the Madras Agricultural Produce Markets Act (XXIII of 1959). There is no question that in making this notification the procedure

prescribed therefor by the Act was duly followed. By section 38 (1), the Madras Commercial Crops Markets Act, 1933 was repealed but by sub-section (2), the market committee established for the notified area under the repealed Act and holding office immediately before the date of the commencement of the Act is deemed to be a market committee established under the new Act for that area and all its members are deemed to be members appointed by the Government or elected under the new provisions. The sub-section further provided that any market established under the repealed Act should be deemed to be a market under the later Act. The market committee, which was functioning under the deeming provisions notified that paddy merchants on and from 1st April, 1964 should purchase their requirements of paddy only from regulated markets and announced the licence fee payable by wholesale dealers and retail dealers in paddy and the rate of cess that would be charged.

The petitioners contended that the Madras Agriculural Produce Markets Act, 1959, is invalid as no previous sanction had been obtained as required by the Proviso to Article 304 of the Constitution. They make a further point that, in any case, the market committee deemed to continue for the notified area has not been duly constituted in accordance with the provisions of the Act We shall first deal with the second contention.

The history of marketing legislation in this State need not detain us except to state that the question was the subject-matter of several reports of committees appointed by the Government for the purposes, and the earliest legislation on this matter in the State of Madras was the Madras Commercial Crops Markets Act, 1933 Substantially all its provisions have been re-enacted with a few changes of which the main is that the Act, unlike before deals not with commercial crops as such but agricultural produce which by notification can be extended to cover any agricultural produce for the purpose of the Act. The Madras Agricultural Produce Markets Act (hereinafter called the Act) received the assent of the Governor on 24th December, 1959 was published in the *Fort St George Gazette*, on 13th January, 1960 and came into force on 22nd October, 1962 The Act is intended to provide for better regulation of buying and selling of agricultural produce and establishment and proper administration of markets for agricultural produce in the State of Madras. It has a definition section and among others the term *agricultural produce* is defined as including anything produced in the course of agriculture and any other produce, whether processed or unprocessed, declared by the Government, by notification, to be an agricultural produce for the purpose of this Act; *market* means any market established under sub-section (3) of section 5 and the *market committee* is one which is established under sub- section (1) or sub-section (2) of section 5 The phrase *notified agricultural produce* means any agricultural produce specified in the notification under section 4. *notified area* is any area notified under section 4 as altered by any notification under section 7 and *uotified market area* signifies any area notified under sub-section (4) of section 5 as altered by any notification under section 7. The intention of the Government to exercise control over the purchase and sale of any specified agricultural produce has to be declared by a notification which shall also call for objections or suggestions to be received within a stated period. After the expiry of the period and after considering such objections and suggestions as may be received, the Government by notification may declare the area specified therein or any portion thereof to be a notified area for the purposes of the Act in respect of any agricultural produce specified in the notification Once a notified area comes into existence in that manner and in accordance with sections 3 and 4, the Government is required under section 5 to establish a market committee for every notified area It is the duty of the market committee to enforce the provisions of the Act as well as the rules and by-laws made thereunder in such notified area. Special provisions have been made in respect of co-operative marketing society which we need not notice for the present purpose. Section 5 further requires any market committee to establish in the notified area such number of markets providing for such facilities as the Government may direct

from time to time for the purchase and sale of the notified agricultural produce. After the establishment of a market by a market committee, the Government may by notification declare the area of the market and such area around the market as may by specified in the notification to be a notified market area for the purposes of the Act in respect of any notified agricultural produce Section 6 provides for control of trading in agricultural produce in a notified area. Within a notified area, no person shall set up, establish or use or continue or allow to be continued any place for the purchase or sale, storage, weighment, pressing or processing of any notified agricultural produce, except under and in accordance with the conditions of a licence granted to him by the market committee Power is given to the market committee to exempt from this restriction any person who carries on business for the purchase or sale of any notified agricultural produce in any quantity not exceeding that prescribed There is also a similar power in the market committee to exempt any producer of an agricultural produce or a co-operative marketing society selling notified agricultural produce which has been produced by it from that restriction. Purchasers of agricultural produce in the notified area of notified agricultural produce for their own domestic consumption below a prescribed quantity are not affected by this restriction. Section 6 also contains provisions which specify the circumstances in which a licence may be refused to a person as well as provisions enabling the market committee in certain circumstances to cancel or suspend the licence after giving the licence-holder a reasonable opportunity of showing cause against such action Power is given to the Government under section 7 to alter notified area or notified market area from time to time by notification Section 8 deals with constitution of market committees by election. Every market committee shall consist of members not exceeding eighteen of whom nine shall be elected by and from among the producers of the notified agricultural produce in the notified area, four by and from among the persons licenced under sub-section (1) of section 6 in the notified area in respect of the notified agriculsural produce and one member is to be appointed by the Government who shall be a a producer residing in the notified area and on the recommendation of the Registrar. This member is intended to represent the co-operatives. In addition the Government may nominate to the committee not exceeding three members The elective principle will be inapplicable to establishment of a first market committee for any notified area The Government in such a case may appoint all the members to function for a period of one year. The elected members under section 11 will hold office for a term of five years. We have already referred to section 38 under which the market committee established under the old Act shall be deemed to continue as a market committee established under the new Act The other provisions which immediately follow that relating to the constitution of market committees deal with officers, meetings, sub-committees, special committee and some of their powers. Section 18 relates to levy of cess by market committee and says that notwithstanding anything contained in the Madras General Sales Tax Act, 1959, the market committee shall levy a cess by way of sales tax on any notified agricultural produce bought or sold in the notified area at a rate not exceeding fifty naye paise for every hundred rupees of the aggregate amount for which the notified agricultural produce is bought or sold whether for cash or for deferred payment or other valuable consideration Sub-section (1) of section 18 has two explanations, the first of which says that for the purposes of this sub-section, all notified agricultural produce taken out or proposed to be taken out of a notified market area shall unless the contrary is proved, be presumed to be bought or sold within such area Sub-section (2) says that the cess under sub-section (1) has to be paid by the purchaser of the notified agricultural produce concerned and it is only where such purchaser cannot be identified the seller shall be liable to pay the cess. Under section 20 a separate fund called the *market committee fund* is to be constituted to which all moneys received by a market committee shall be paid into and from which all expenditure incurred by the market committee under or for the purposes of the Act shall be defrayed. The purposes for which the fund may be expended are set out in section 21 which includes acquisition of site or sites, for the market, maintenance and improvement

of the market, construction and repair of the buildings which are necessary for the purposes of such market and for the health, conveniences and safety of the persons using it, provision and maintenance of standard weights and measures, pay, pension, leave allowances, gratuities, compassionate allowances, etc of the officers and servants employed by the market committee, payment of interest on loans, collection and dissemination of information regarding all matters relating to statistics and marketing in respect of the notified agricultural produce, schemes for extensions or cultural improvement of the notified agricultural produce within the notified area including the grant of financial aid to schemes for such extension or improvement within such area, schemes for grading of agricultural produce and also expenses of and incidental to elections. The rest of the provisions in the Act provide for borrowing power of the market committee and the powers of the Government to supersede such committee in any notified area Under section 25 any person who fraudulently evades payment of any fee, cess or other amount due from him under the Act or the rules or by-laws made under the Act or wilfully acts in contravention of any of the provisions of the Act commits an offence punishable with fine The Act also provides for composition of offence Section 29 vests in the Government rules making powers in general and specifies certain matters in respect of which the Government may make rules. A market committee under section 30 is empowered to make by-laws for its notified area for the relgulation of the business and the conditions of trading in that area. Any by-law so made may provide that any contravention thereof shall be punishable with fine which may extend to fifty rupees. Elaborate rules called the Madras Agricultural Produce Market Rules, 1962, have been framed

The argument for the petitioners is that having regard to the language of section 5 (1) in the context of sections 3 and 4 and the definitions of *agricultural produce, market committee, notified agricultural produce, notified, area, notified market area,* what is contemplated by the Act is establishment of a market committee for every notified area, that is to say, as a notified area for the purposes of the Act declared under section 4 in respect of any agricultural produce specified in the notification under that section There must be a separate market committee for each notified agricultural produce with reference to which a notified area is set up If a notified area for the purpose of the Act is in respect of a notified agricultural produce specified in the notification, it follows, according to the argument, that when section 5 (1) speaks of establishment of a market committee for every notified area it means establishment of a market committee for every notified area in respect of agriculsural produce specified in the relative notification The market committee which existed prior to the new Act and which is deemed to continue under section 38 for the purpose of the Act having been established for commercial crops which did not include paddy in the North Arcot District has no power or jurisdiction to regulate purchase and sale of paddy Though the North Arcot District has been notified as a notified area for the purpose of the Act in respect of paddy, no market committee has been established under the provisions of the Act in respect of the notified agricultural produce, namely, paddy. This argument would appear to have been addressed to Kailasam J., before whom these petitions were posted in the first instance but in a slightly different form The learned Judge stated that the legality of the market committee constituted under the Madras Act (XX of 1933) to function as such under the Madras Agricultural Produce Markets Act was questioned by the petitioners, while for the Government it was contended that the old committee had been validly continued under section 38 (2) of the Act and that it could effectively function and discharge the duties imposed by the existing Act, and expressed the view:

> " In my opinion section 38 (2) cannot be read to enable the market committee under the repealed Act to continue as the market committee under section 8 of Act (XXIII of 1959). A specific provision is made under Act (XXIII of 1959) for establishment of a market committee and for representation in it The requirements of section, namely, giving representation to the producers and licensed persons in the notified area, cannot be fulfilled by continuing the market com-

mittee under Act XX of 1933. This question was raised before Srinivasan, J, in (*M. S Mahendra Kumar Ishwarlal & Co.* v. *The State of Madras and another*[1]). The learned Judge was of the view that the old market committee continued by the saving provision of Act (XXIII of 1959) to exercise the functions of that market committee under Act (XXIII of 1959) With respect I am unable to concur with the learned Judge."

In that view he directed the petitions to be posted before a division Bench for disposal. Before Srinivasan, J, the contention was that if the committee which had been constituted under the Madras Commercial Crops Markets Act in respect of groundnut was to continue to be the market committee under the 1959 Act, there could possibly be no representation of the notified agricultural produce, jaggery, upon such committee, that it should therefore, follow that if the market committee was to be representative as contemplated by section 8 of the 1959 Act, the groundnut market committee, as it might be described, could not provide for such representation, and that, therefore, there should be a separate market committee for each notified agricultural produce On this argument, the learned Judges' view was :

"It seems to me that having regard to the functions with which the market committee is charged, this argument lacks substance. It is true that a market committee is established for every notified area A notified area is no doubt linked with a particular agricultural produce It does not immediately follow that the same market committee cannot function for the purposes of the Act in respect of different notified products. In common practice, an area where a particular agricultural produce is produced is notified and within the same notified area there may be more than one agricultural produce the marketing of which requires to be regulated ; in such a case, even though there may be more than one agricultural produce grown or produced in that area, the same market committee can exist and function in respect of the notified area. In so far as the representation on the market committee is concerned, the section itself contemplates that if more than one agricultural produce is to be controlled by the legislation in the notified area, then the producers and licensees of the notified agricultural produce shall be represented on the committee It may be that the old market committee which shall continue by the saving provisions of the Act may have to be re-constituted in the light of the requirements of the new enactment ; that is a matter of detail which does not affect the validity of the constitution of the market committee"

With respect of we are of opinion that the view taken by Srinivasan, J, as to the effect of section 38 (2) even in the context of section 8 is the correct one.

It is true that an area for the purposes of the Act is declared as a notified area with reference to a specified agricultural produce and that the Government shall establish a market committee for every notified area. But it does not follow that for every notified agricultural produce there must be a separate market committee to regulate its purchase or sale in the notified area An area may be notified in respect of particular agricultural produce and the same area may again be notified in respect of several other agricultural produce. If there are several notified agricultural produce for each of which the notified area is the same, which is permissible under sections 3 and 4, we do not see why the same market committee for the same notified area cannot function and have control in respect of every one of such notified agricultural produce. The question is one of power to declare a notified area and establish market committee in every such notified area and this power can well be exercised in such a manner that either there may be a separate notification declaring a notified area in respect of each agricultural produce and establishment of a market committee for such notified area or a comprehensive notification declaring a notified area in respect of more than one agricultural produce and establishing a market committee for such area with jurisdiction to regulate all the notified agricultural produce in that area. We are, therefore, wholly unable to accept the argu-

1. W.P. Nos 1226, 1234 to 1240, 1447 and 1448 of 1963.

ment that under section 5 there must be a market committee separately established for each agricultural produce

Nor do we think that because the market committee continued by the deeming provison of section 38 (2) of the Act is not representative unlike a market committee constituted under section 8 of the Act, the old market committee deemed to continue cannot be either legal or effective for the purposes of the present Act Section 38 contains both a repealing and saving provision While repealing an Act it is within the power of the Legislature to say what shall continue notwithstanding the repeal Sub-section (2) of section 38 not only says that the market committee established under the repealed Act would be deemed to be established as market committee under the repealing Act for the said notified area but also provides that all members of the old market committee shall be deemed to be members appointed under the repealing Act The sub-section also says that any market established under the old Act shall be deemed to be the market established under the new Act The object of this provision is obvious, namely, where there is already a market committee functioning immediately before the commencement of the Act, there is no need to put it out of action at the commencement of the Act and have a market committee established under section 8 Where there was no market committee in existence under the old Act for any area which is a notified one under the present Act, power is given to the Government in section 8 itself to constitute the first market committee by appointment of its members for specific period, but where a market committee was functioning under the old Act, the intention is to deem it as established under the new Act for the relative notified area and thus avoid hiatus in administration, if the elective principle is to be resorted to, even at the commencement of the new Act It may further be observed that the principle of election in section 8 is subject to further limitation, namely, that the Government, if it considers it desirable, can extend the life of a market committee like the first market committee consisting entirely of members by appointment beyond the specified period of one year Apart from sub-section (2) of section 38 being a saving provision in the context of the repeal of the earlier Act, the sub-section is practically a proviso in effect to section 8 This is evident from the fact that the direction of sub-section (2) of section 38 is that the old market committee shall not only be taken to be a market committee established under the provisions of the new Act but also that its members are to be taken as appointed under the new Act, so that the sub-section clearly indicates that section 8 will have no application to such a case governed by the sub-section There is, therefore, nothing to invalidate the deeming provision and we are not persuaded that the market committee as continued in this case by section 38 (2) is not effective or not properly constituted for the purposes of the 1959 Act

The constitutional ground of attack on the validity of the Act is that anything which impedes, limits or circumscribes in any way the freedom of trade, commerce and intercourse, be it in respect of place, time, territory, or movement is a restriction on the freedom and that although such a restriction may be reasonable and in public interest, it can be valid only if the Proviso to Article 304 has been complied with The argument proceeds that the provisions of the 1959 Act which require a licence to set up a place within a notified area for the purchase or sale of notified produce and certain other specified purposes connected therewith and also require the notified produce to be taken to the market within the notified area for purchase or sale, storage, weighment, pressing or processing thereof and thus restrict the movement of the notified agricultural produce within the said area and authorise levy and collection of cess by way of sales tax on any notified agricultural produce bought or sold in the notified market area, are restrictions on the feedom to carry on trade guaranteed by Article 19 (1) (*g*) as well as the declaration under Article 301 of the Constitution that trade and commerce throughout the territory of India shall be free and that even if a law imposing such a restriction is saved by Article 19 (6) on the ground that the restriction is a reasonable restriction and in the interest of the general public, the law may nevertheless be invalid for non-compliance with the Proviso to Article 304 On the other hand, it is contended for the State that

the Act is merely regulatory the object of legislation being to facilitate trade in the notified agricultural produce within the notified area and is, therefore, not hit by Article 301

The controversy raised before us has not been the subject-matter of any direct decision brought to our notice and is not, in our opinion, free from difficulty There are a few cases in which the validity of marketing legislation *vis-a-vis* Articles 19 (1) (*g*) and 19 (6) was canvassed and decided but not with reference to Article 301 and 304 *Kutti Keya* v *State of Madras*[1], in which a division Bench of this Court was concerned with the validity of the Madras Commercial Crops Markets Act, 1933, held that the Act did undoubtedly restrict the freedom of a person to trade as and where he willed—indeed it was enacted for the very purpose of controlling business in commercial crops but these restrictions were reasonable and in public interest. In coming to that conclusion, the Court touched on the need for such a legislation, made a survey of the marketing legislation and pointed out that its object was to protect the producers of commercial crops from being exploited by middlemen and profiteers and to enable them to secure a fair return for their produce An argument based on Articles 301 and 304 (*b*) was also considered but was disposed of on the view that as the Act impugned before it was an existing law within the meaning of Article 305, its validity was not affected by Article 301 While considering the question, however, reference was made to certain Australian decisions rendered on section 92 of the Australian Constitution and the view was expressed that the section hit only laws which prohibited or hampered inter-State trade and not those which merely regulated it The division Bench was apparently inclined to the view that the trade within the State protected by Article 301 and 304 (*b*) would be not intra-State trade pure and simple but inter-State trade in its flow in the State In passing we may mention that it has since been held authoritatively by the Supreme Court in *Atiabari Tea Co, Ltd* v *State of Assam*[2], and *Automobile Transport Ltd* v *State of Rajasthan*[3], that in view of the expression *throughout the territory of India* in Article 301, it provides not only for freedom of inter-State trade but also intra-State trade, commerce and intercourse The judgment of this Court in *Kutti Keya* v *State of Madras*[1], that the 1933 Act did not offend Article 19 (1) (*g*) as restrictions imposed by it were reasonable and in public interest was affirmed by the Supreme Court in *Arunachala Nadar* v *State of Madras*[4] In *Mohammed Hussain* v *State of Bombay*[5], the constitutional challenge to the validity of the Bombay Agricultural Produce Markets Act, 1933, was confined to Article 19 (1) (*g*) which was repelled by the Supreme Court applying *Arunachala Nadar* v. *State of Madras*[4] Gujarat Agricultural Produce Markets Act, 1964, was held not to offend Article 19 (1) (*g*) in *Jan Mohammad* v. *State of Gujarat*[6] There again no contention was based on Part XIII of the Constitution *Thakur Prasad* v *State of Bihar*[7], found that the Bihar Agricultural Produce Markets Act, 1960 had been enacted after duly obtaining the sanction of the President for the Bill before its introduction in the State Legislature and did not have to consider whether the legislation fell with in the ambit of Part XIII. Likewise the question was not debated in *Bhikam Chand* v *The State*[8], as it turned out that for the Rajasthan Agricultural Produce Markets Act, 1961, the assent of the President was obtained under Article 255 of the Constitution

The question we are, therefore, called upon to decide is whether the 1959 Act is hit by Article 304 (*b*) and is invalid for failure to obtain the sanction of the President under the Proviso to that Article The answer to the question will depend on whether the Act imposed restrictions on the freedom of trade, commerce and intercourse with or within the State of Madras Learned Counsel for one of the petitioners argues that *Kutti Keya* v *State of Madras*[1], having for the purpose of Article 19 (1) (*g*) and (6) held that the Madras Commercial Crops Markets Act, 1933, imposed

1 (1954) 1 M L J 117
2. (1961) 1 S C R 809 A I R 1961 S C. 232
3 (1963) 1 S C R 491 A I R 1962 S C 1406
4 (1959) S C J 297 (1959) 1 S C R (Sup) 92 (1959) 1 An W R (S C) 133 : (1959) 1 M L J (S C) 133 : A I R 1959 S C 300
5 (1962) 2 S C R 659 A I R 1962 S C 97.
6 (1966) 1 S C R 505 . (1967) 1 S C J. 82: A I R 1966 S C 385
7 A I R 1965 Pat 267
8 I L R (1965) 15 Raj 897.

restrictions on freedom of trade but they were reasonable restrictions and in public interest and the 1959 Act which repealed it, being *in pari materia* with it, the position is no different for the purpose of Article 304 and that being the case, the 1959 Act should fail because, in fact, the requisite sanction of the President was not obained for the introduction of its Bill. He says that the restrictions on the freedom of trade in Part XIII should be understood as having the same meaning and content for the purpose of both Articles 19 (1) (*g*) and 301, as they overlap and practically cover the same field of liberty.

The real question, in our opinion, is as to the scope and ambit of the freedom declared by Article 301 and whether any restriction, whatever its nature and incidence, is forbidden by that Article except to the extent saved or excepted by the succeeding Articles in Part XIII We do not think that a mere comparative examination of Articles 301 and 19 (1) (*g*) will serve the purpose of solving the problem we have to answer. Article 310 says that trade, commerce and intercourse throughout the territory of India shall be free. But this declaration will operate subject to the other provisions of Part XIII, namely, Articles 302 to 305 and 307. The freedom under Article 301 being a fetter on the legislative powers of both the Parliament and the State Legislature, the rest of the Articles in Part XIII lift the fetter to the extent specified and in stated circumstances, subject however, to certain conditions and exceptions. If and to the extent public interest requires, Parliament may impose restrictions on the freedom; and likewise the State Legislatue too may impose restrictions on the freedom of trade, commerce or intercourse with or within the State, provided the restrictions are reasonable and such as are required in public interest and further the Bill relating to the matter is introduced with the previous sanction of the President. But this power of the Parliament to impose restrictions will not avail to make a law which prefers or authorises preference of one State to another or which discriminates or authorises discrimination between one State and another. This restriction also applies to the State Legislature. But such preference or discrimination will be unobjectionable in parliamentary legislation if it is necessary and is so declared to be for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. The State Legislature is also forbidden from imposing any discriminatory tax on goods imported from other States. The law existing and in operation before the commencement of the Constitution (Fourth Amendment) Act, 1955, subject to certain qualifications are, however, saved from the scope of Articles 301 and 303 That in broad outline is the subject of Part XIII It is well known that the Articles in that Part have been phrased in the light of the experience gained of the cognate provisions in some of the federal Constitutions of the world, especially the commerce clause in the Constitution of the United States, section 92 of the Australian Constitution, section 121 of the British North America Act and in the background of the problems relating to trade, commerce and intercourse in the then British India, Princely States and post-independent merger period that confronted the framers of the Constitution. In framing Part XIII they kept in view the economic unity of India as a whole and at the same time the inter-State needs, exigencies and necessities in the context of a developing economy and in their inter-relation with the unity of India in the field of trade, commerce and intercourse In addition to these considerations, in interpreting the scope of the freedom, the related restrictions or exceptions would have to be borne in mind, that freedom in organised society governed and regulated by law and order is not absolute freedom which will mean anarchy and confusion, but a relative concept which, by very nature of things, implies mutual alignment and adjustment of conflicting, unequal or even parallel interests, rights and liabilities in order to facilitate, promote and subserve the good of the individual as well as of the community.

It has accordingly been held by a majority judgment of the Supreme Court in *Atiabari Tea Co., Ltd.* v *State of Assam*[1], that while Article 301 imposed a constitutional limitation on the legislative power of Parliament and the Legislatures of the States and applied not only to intra-State trade, commerce and intercourse, but

1 (1961) 1 S.C.R. 809 : A.I.R. 1961 S.C. 232

also intra-State trade, commerce and intercourse the intention of Part XIII of the Constitution was to safeguard the principle of the economic unity of the country and the content of freedom, provided for by Article 301 was larger than the freedom contemplated by section 297 of the Government of India Act, 1935 and whatever else it might or might not include, it included movement of trade which was of the very essence of all trade and was its integral part The majority further held, and it is very important in the present context, that restrictions, freedom from which was guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the very flow of movement of trade and

> " ....in determining the limits of the width and amplitude of the freedom guaranteed by Article 301, rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement?"

The correctness of this view was considered by a larger Bench of the Supreme Court in *Automobile Transport Ltd.* v. *State of Rajasthan*[1]. The majority held:

> " We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the *Atiabari Tea case*[2], is correct, but subject to this clarification Regulatory measure or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the Proviso to Article 304 (*b*) of the Constitution."

Reference in the first sentence of the excerpt from the judgment of Das, J. is to the two other views expressed by the minority including the then learned Chief Justice, in *Atiabari Tea Co , Ltd* v. *State of Assam*[2], Das, J., referred to the fact that the language employed in Article 301 ran unqualified and after stating that the Court should nevertheless, bearing in mind the fact that the provision had to be applied in the working of an orderly society, add certain qualifications subject to which alone that freedom might be exercised, a point of view to be found in the dissenting opinion of Fullagar, J , in *Mc Carter* v. *Brodie*[3], which was accepted by the Privy Council in *Hughes and Vale Proprietary Ltd* v *State of New South Wales*[4], and observed that if the word *Free* in Article 301 meant *freedom to do whatever one wants to do* then chaos might be the result. The learned Judge concluded (at page 1420)·

> " The collection of a toll or a tax for the use of a road or for the use of a bridge or for the use of an aerodrome is no barrier or burden or deterrent to traders, who, in their absence, may have to take a longer or less convenient or more expensive route Such compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; but they could of course, be converted into a hindrance to the freedom of trade If the authorities concerned really wanted to hamper anybody's trade they could easily raise the amount of tax or toll to an amount which would be prohibitive or deterrent or create other impediments which instead of facilitating trade and commerce would hamper them It is here that the contrast, between 'freedom' (Article 301) and 'restrictions' (Articles 302 and 304) clearly appears, that which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible *apriori* to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade, but the distinction, if it has to be drawn is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade So long as a tax remains compensatory or regulatory it cannot operate as a hindrance"

1 (1963) 1 SCR 491 · AIR 1962 SC 1406, 1424
2. (1961) 1 SCR. 809 : AIR 1961 SC 232
3. (1950) 30 CLR 432
4 (1955) AC 241.

Subba Rao, J as he then was, concurring with Das, J took substantially the same view and observed (at page 1430):

"The word 'freedom' is not capable of precise definition, but it can be stated what would infringe or detract from the said freedom Before a particular law can be said to infringe the said freedom, it must be ascertained whether the impugned provision operates as a restriction impeding the free movement of trade or only as a regulation facilitating the same Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provision for lighting, speed, good condition of vehicles, timings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it So too, licensing system with compensatory fees would not be restrictions but regulatory provisions; for without it, the necessary lines of communication such as roads, waterways and airways, cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one . .. It is for the Court in a given case to decide whether a provision purporting to regulate trade is in fact a restriction on freedom."

The further observations as to what was meant by *Restrictions* in Article 302 are (at page 1433):

"But the more difficult question is, what does the word "restrictions" mean in Article 302? The dictionary meaning of the word "restrict" is "to confine, bound, limit." Therefore any limitations placed upon the freedom is a restriction on that freedom. But the limitation must be real, direct and immediate, but not fanciful, indirect or remote. . . Of all the doctrines evolved in my view, the doctrine of 'direct and immediate effect' on the freedom would be a reasonable solvent to the difficult situation that might arise under our Constitution. If a law, whatever may have been its source, directly and immediately affects the free movement of trade, it would be restriction on the said freedom But a law which may have only indirect and remote repercussions on the said freedom cannot be considered to be a restriction on it.".

Subba Rao, J., as he then was summed up his views in the following words (at page 1436):

"The foregoing discussions may be summarised in the following propositions: (1) Article 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State or other impediments operating as such barriers. (2) The said freedom is not impeded, but on the other hand, promoted by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, wharfs, etc. with or without compensation. (3) Parliament may by law impose restrictions on such freedom in the public interest and the said law can be made by virtue of any entry with respect whereof Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Article 304 (*b*) and subject to the Proviso mentioned therein (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and another, by virtue of any entry in the Lists, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Article 304 (*b*), subject to the conditions mentioned therein And (7) the State can impose a non-discriminatory tax on goods imported from other States or the Union territory to which similar goods manufactured or produced in the State are subject."

It is thus well established that regulatory provisions which do not directly or immediately impede or burden the free movement of trade, commerce and intercourse but provide or intend to provide facilities for trade, commerce and intercourse are not restrictions within the meaning of Part XIII and are compatible with the freedom of trade declared by Article 301 *Atiabari Tea Co., Ltd.* v. *State of Assam*[1], and *Automobile Transport Ltd.* v *State of Rajasthan*,[2] are both cases of imposition of tax The first was concerned with the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954, which was successfully attacked on the ground that it violated Article 301 and was not saved by Article 304 (*b*) The Act imposed a tax on specified goods transported by road or inland waterways in the State of Assam. The majority in that case held that the Act put a direct restriction on the freedom of trade and, since in doing so, had not complied with the provisions of Article 304 (*b*), it must be declared to be void. In the second case the Rajasthan Motor Vehicles Taxation Act, 1951, was impugned as violating Article 301 But the majority did not accept the contention on the view that the Act was merely a regulatory measure imposing compensatory taxes for the use of trading facilities The scope of Article 301 was again in the light of the earlier decisions referred to in *Khyerbari Tea Co* v. *State of Assam*[3], where the Assam Taxation (On goods carried by Roads or Inland Waterways) Act as amended after *Atiabari Tea Co.. Ltd.* v. *State of Assam*[1], was attacked on various grounds but without success.

As already seen, the distinction between a restriction and a regulation is fine but real, though the dividing line is not capable in the nature of things of a comprehensive and satisfactory definition The test, broadly speaking, is whether the impugned provisions lay a direct and immediate burden on the movement of trade, commerce and intercourse or are intrinsically beneficial to and provide, in the ultimate analysis, facilities for better conduct of trade, commerce and intercourse. Observed Das, J, in *Automobile Transport Ltd* v *State of Rajasthan*[2]

> " It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities "

No doubt this observation was made in the light of the compensatory tax levied by the Act then in question, but it contains, in our opinion, the principle or test of a regulatory legislation If an Act is not intended as a tax measure to raise money for running the Government, nor is it intended to restrict the movement of free trade, commerce and intercourse, or in any other way place burdens or limitations on trade or free flow of trade, commerce and intercourse, but the Act is essentially designed to protect certain transactions in certain specified commodities in order to benefit their producers and in doing so, regulates purchase and sale of such goods by providing for a licensing system, market and other facilities in specified area in order that the evils of trade through middlemen may be eliminated for the benefit of the community, such an Act will be clearly regulatory in character and in no way inconsistent with the freedom declared by Article 301 That being the case, there will be no occasion to invoke the saving provisions in Part XIII to sustain an enactment of that kind.

We have already set out the salient provisions of the Act under attack before us. The object of this enactment is to secure the best price to the producers of notified agricultural produce in notified areas This object is achieved by regulating trade in agricultural produce in such areas by the requirement as to licence and providing special market and other facilities for proper and better marketing of notified agricultural produce, like storage, weighment, pressing or processing including schemes for grading of such produce. Within the notified area, no one can set up, establish or use any place for the purchase of sale, storage, weighment, pressing

1. (1961) 1 S C R 809 . A I R. 1961 S C 1406.
3 (1964) 5 S C R. 975 · A I R. 1964 S C 925.
2. (1963) 1 S.C R 491 · A.I R. 1962 S.C. 1406.

or processing of any notified agricultural produce except under and in accordance with the conditions of a licence granted to him by the market committee A market committee is established to carry out the purposes of the Act which would bring into existence markets within the notified area with necessary facilities, and to defray the expenses, the Act authorises the committee to levy a cess by way of sales tax on any notified produce bought or sold in the notified market area at a rate not exceeding a specified rate. The cess collected is to be kept as a specified rate called the *market committee fund* from which expenses incidental to regulation of buying and selling of agricultural produce, proper establishment of markets for such produce, establishment and maintenance charges, etc, are to be defrayed. It has been contended before us that the provision for licence places a restriction on the freedom of trade in the notified area, and as such, unless it is saved by Article 304 (*b*) and read with its Proviso, it is invalid as violating Article 301. We are unable to accept this view. It is true that *prima facie* the provision requiring licence appears to be prohibitory in form as it says that no place shall be used within the notified area for purchase or sale of notified agricultural produce except and in accordance with the conditions of the licence granted to him by the market committee But the intention and effect of this provision is not to place restraint on trade directly or immediately The prohibition is not against any person at all purchasing or selling or carrying on business in the notified agricultural produce in the notified area; the requirement is only, to put it in a positive form, that the purchase or sale, storage, weighment, pressing or processing of any notified agricultural produce should be at the place provided therefor and in accordance with the conditions of a licence The space ear-marked for the purpose will be an established market in the notified area for the particular notified agricultural produce with all facilities of storage, weighment, pressing or processing thereof and other marketing facilities designed to get the best return for the producer. No one, and least of all the middleman, is prevented by the licensing provision from plying his trade, but the aim is to bring the seller and the purchaser on equal basis to ensure a fair bargain and proper price for the produce. The various reports on the matter show that the producer or others carrying on transactions in a particular produce have lacked facilities for storage, weighment, pressing or processing and obtaining the best price. It is not unoften that the agriculturists have been too much dependent upon certain dealers who give credit to them and purchase agricultural produce from them at a bargain which is not always to the best advantage of the agriculturists The necessity to put an end to this kind of evil cannot be gainsaid. The concept of freedom does not mean, in an organised society governed by law and regulation, that any person can under its umbrage seek protection and cover to continue to carrying on certain undesirable trade practices and exploitation which affect the agriculturists and the general economy so far as it concerns the particular notified agricultural produce Can any one say that, in such circumstances he has freedom of trade declared by Article 301 in his favour and he is, therefore, at liberty to ply his trade as he likes however detrimental it might be to the public good? The answer should obviously be in the negative and this is on the ground that the law may permit reasonable restraint on the freedom. As we said, the concept of freedom itself is a qualified and a relative one and can never be understood in the absolute sense, so long as people choose to live as an organised society. For instance, a citizen is guaranteed the freedom of movement, but in exercise of it, he cannot claim to collide against another citizen, for, the latter may legitimately say that the former's, freedom ends where his nose begins. Further, it should be seen that producers of agricultural produce can legitimately seek proper and better marketing facilitie and adequate returns One method of giving effect to that object is to regulate the markets for such produce by the system of licensing. The purpose in that case is not to put a restraint upon trade in any manner but to regulate it in order to ensure such facilities. There may be a variety of licensing systems some of which may directly be designed to impede, burden or restrain movement of trade. But we do not think that the 1959 Act falls within that category The two Provisos to section 6 (1) provide that the market committee may exempt from the provisions

of the licensing provision any person who carries on the business of purchasing or selling any notified agricultural produce in any quantity not exceeding that prescribed, and that a producer selling his notified agricultural produce which he has grown, reared or produced or a co-operative marketing society selling notified agricultural produce which has been grown, reared or produced by any of its members is not affected by the provision of licensing. This again shows that the object of the licensing system is to benefit such producers and the co-operative societies and exempt small traders from the purview of the Act.

But it is said that section 6 (1) provides for an unguided discretion in the matter of grant or refusal of licence and that the discretion might be used in such a manner as to impede or restrain trade We do not think that that is a proper construction to be placed on section 6 (1) The object of the Act is to be found in the Preamble, namely, better regulation of buying and selling of agricultural produce and the establishment and proper administration of markets for agricultural produce. This and the provisions of the Act as a whole will be a guide in the matter of granting licence Further where a discretionary power is vested in a public authority, it is invariably meant for exercise in favour of individuals who seek licence and the licence can be denied only for proper reasons This question was touched upon from the standpoint of Article 19 (1) (*g*) and (6) in *Kutti Keya* v *State of Madras*[1], and the Court observed:

> " Section 5 (4) (*a*) (Act XX of 1933), does confer on the Collector an unlimited and uncontrolled discretion to grant or refuse licences as he might choose and a provision which makes the exercise of a fundamental right dependent on the absolute discretion of administrative authorities must be held to be unconstitutional The learned Advocate-General did not dispute the correctness of this position, he merely stated that as a fact there had not even been a single instance of refusal to grant a licence It may be conceded that the intention of the Legislature was that all persons who apply for licence should get them and that none should be refused though being a pre-Constitution enactment, the language is undoubtedly wide As it stands, the section must be held to be void in so far as it confers on the Collector an authority to refuse a licence at his will This conclusion however does not entail the consequence of the entire licensing regulation becoming void, because its only result is that all applicants are entitled to obtain licences provided they pay the prescribed fee and comply with the other conditions "

Section 5 (4) of the 1933 Act is *in pari materia* with section 6 (1) of the 1959 Act and those observations, with equal force, will apply to the latter provisions That means, subject to the provisions of sub-section (3) of section 6, every person who applies for a licence under section 6 (1) will be entitled to it. Sub-section (3) specifies certain cases of persons to whom licence should be declined or the circumstances in which a licence granted may be cancelled In our opinion, it cannot be said that because of the provisions in sub-section (3) of section 6, the licensing system provided by section 6 (1) is invalid as placing a restraint on freedom of trade Nor can we find that the levy of cess by the market committee under section 18 is intended or acts as a direct or immediate restraint on trade in the notified agricultural produce The fee is levied for the purpose of meeting the expenses in operating the regulatory provisions of the Act As already mentioned, the fees collected come into a separate fund from which all expenses are met The fee was viewed under the 1933 Act as a tax by the division Bench in *Kutti Keya* v *State of Madras*[1] This was apparently for the reason that the fund could be applied for the maintenance and improvement of the market, acquisition of sites for the market, the construction and repair of buildings, payment of pensions, interest on loans, the collection and dissemination of information regarding all matters relating to statistics and marketing in respect of the notified agricultural produce and schemes for grading of agricultural produce and expenses of and incidental to elections to the market committee.

1. (1954) 1 M L J 117, 124

But it may be seen that all these factors for which section 18 provides that the fund may be applied to, are necessary and form part of the service rendered in marketing the notified agricultural produce. In that sense and having regard to the later decisions of the Supreme Court, the proper view to take may be that what is provided for under section 18 is only a fee *Kutti Keya* v *State of Madras*[1], itself did not declare section 11 of 1933 Act (levy of fees by market committees) to be unconstitutional as it considered that it was not necessary to decide the question But even as a sales tax, and we do not regard it as such under section 18 of the 1959 Act, we do not see why the Legislature is not competent to authorise its levy for purposes of that Act

We are, therefore, of opinion that the Madras Act (XXIII of 1959) is regulatory in substance and character and does not violate Article 301 of the Constitution. There is, therefore, no need to resort to Article 304 (*b*) to save the Act.

One other contention for the petitioner is that *Explanation* (1) to section 19 (1) is unconstitutional We have already noticed that sub-section (1) provides for authority to the market committee to levy a cess by way of sales tax on the purchase or sale of any notified agricultural produce in the notified market. *Explanation* (1) says that for the purposes of sub-section (1) all notified agricultural produce taken out or proposed to be taken out of a notified market area shall, unless the contrary is proved, be presumed to be bought or sold within such area. The contention is that as a result of the *Explanation* what are not sales are deemed to be sales and an impost is levied on them and the power of the Legislature being only to impose a tax on actual purchases or sales and not deemed sales which are not sales of goods in the strict sense of the law, the *Explanation* should be struck down. The *Explanation* is only a rule of evidence. We do not think that there is any substance in this contention Its effect is not to impose or authorise imposition of a fee in the nature of sales tax on deemed purchase or sale of notified agricultural produce The presumption is intended to make sub-section (1) as effective as possible and to avoid possibility of evasion The presumption is rebuttable, and the person concerned can always show that the notified agricultural produce taken out or proposed to be taken out of a notified market area is not the subject-matter of any purchase or sale within the notified area

The petitions fail and they are dismissed, but with no costs

V K. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T RAMAPRASADA RAO.

Messrs P. M S & Co., Nagercoil .. *Appellant**

v.

The State of Madras represented by the Commissioner of Commercial Taxes, Board of Revenue, Madras .. *Respondent*

Madras General Sales Tax Act (I of 1959),—Sale and works contract—Levy of tax on sales in cases of works contract—Principles of test to decide whether there is any sale of goods in works contract.

Whether a given transaction is a works contract or a sale of goods is a mixed question of law and fact and will have to be answered invariably by the terms of the particular contract and not from the invoices issued by the persons entitled to receive money under the contract. It has to be seen whether on a fair reading

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1. (1954) 1 M L J. 117.

* T.C. No. 242 of 1964 (App. No II.) 7th July, 1967

of the contract the parties agreed to sell and purchase a finished or completed article or commodity or meant to treat the transaction as one for labour to be bestowed on the article or commodity as a base In cases of works contract relating to immovable property where the contract is a composite one it is to be found whether it can be split up and a part of it can be regarded as an agreement to sell specific goods incorporated to immovable property. If the contract for work is one in which the use of materials is necessary or incidental to the execution of the work, it is one for execution of work not involving sale of goods. In a works contract where the contractor executes the work according to the specifications and in consideration therefor receives payment there is neither a contract to sell the materials used in the construction nor does property pass therein as moveables

Appeal under section 37 of the Madras Act I of 1959 praying the High Court to revise the order of the Board of Revenue, Madras in B P. No 327 of 1964

S. Swaminathan and *T. S. Srinivasan*, for Appellant.

K. Venkataswami, for the Additional Government Pleader, for Respondent.

The Order of the Court was delivered by

Ramaprasada Rao, J—The appellants are licensed plumber and Sanitary Engineers The Deputy Commercial Tax Officer, Nagercoil, brought in turnover of Rs. 63,591-30 as exigible to tax. On appeal the Appellate Assistant Commissioner, deleted from the above a turnover of Rs 41,257-99 on the ground that there was no passing of property in the goods supplied by the appellants until the work involved was completed in accordance with the specification of the other party. The Board of Revenue, in revision disagreed with the reasoning of the Appellate Assistant Commissioner and brought to tax the turnover deleted by him and rested its conclusion on the decision in *Udani Engineering Co* v *State of Madras*[1].

Aggrieved by the order of the Board of Revenue, the assesses have filed this appeal. Mr. S. Swaminathan contends that by reason of the subsequent pronouncements of the Supreme Court and in particular the decision of this Court in *General Electric Co. of India Private Ltd* v *Government of Madras*[2], the Board has not applied the principles whereby tax is exigible in works contracts and that the deletion of the turnover by the Appellate Assistant Commissioner is in order. In order to appreciate the course of dealings of the appellants, certain sample bills made available before the hierarchy of tribunals below have been referred to once again before us. One such bill is made under the caption "Bill for providing sanitary arrangements." Almost each item connotes that the amount indicated as against it, covers both the price of the articles supplied and the charges for fitting the same. It appears to be a consolidated bill It cannot *prima facie* be equated to a sale note of materials, as the Board appears to have done It has been pointed out by the Supreme Court in *Aruan Electrics* v. *Commissioner of Sales Tax*[3], that the invoice alone ought not to be the sole guide to interpret the arrangement between the parties The Supreme Court has said:

> "The question whether in respect of a transaction sales tax is exigible may be determined only on the terms of the contract and not from the invoice issued by the person entitled to receive money under the contract."

Therefore, the Board of Revenue has committed an error in deciding the material issue resting its conclusion on the details quoted in the bills, without considering what possibly could be the terms of arrangement between the parties when the work was in progress.

The Court in a recent judgment in *Mckenzies Ltd* v *Board of Revenue*[4], summaraised the legal position as follows as regards the liability or otherwise to tax transactions involving work and labour:

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1. T.C No. 55 of 1960.
2. T.C. 28 of 1964.
3. (1966) 17 S T C 576
4. T.C No. 101 & 102 of 1964

"Whether a given transaction is a works contract or a sale of goods is a mixed question of law and fact, and will have to be answered invariably in relation to the terms of a particular contract. The test will be the intention of the parties as gathered from the entirety of the contract, whether on a fair reading of the contract the parties agreed to sell and purchase a finished or a completed article of commodity or meant to treat the transaction as one for labour to be bestowed on an article or commodity serving as the base It may also be useful and necessary to keep in mind whether the transaction relates to a movable or an immovable. In the case of the latter the question will be whether the entire construction or product in the nature of immovable property is meant to be sold or where a construction or works are to be carried out on immovable property, the property in materials, by what is done on or to immovable property pass by affixture in the process of the works, In other words, if the contract is a composite one, it is to be found out whether it can be split up and a part of it can be regarded as an agreement to sell specific goods incorporated to immovable property The same test may also to some extent apply to works relating to a movable."

Again the Supreme Court has reiterated the above principle, in a slightly different form in *Andhra Pradesh* v *Gundur Tobaccos Ltd* [1], where their Lordships say that if the contract for work is one in which the use of materials is necessary or incidental to the execution of the work, it is one for execution of work not involving sale of goods Again in later case this well set ratio has been couched in different language by the Supreme Court in *John Mowlem & Co* v. *Commissioner of Sales-Tax*[2], and *State of Gujarat* v *Kailash Engineering Co (P) Ltd.*[3] The following passages therein make the position reasonably clear

"In a works contract, the agreement between the parties is that the contractor should construct the works according to the specifications contained in the agreement and in consideration therefor receive payment, and as provided therein and in such an agreement there is neither a contract to sell the materials used in the construction, nor does property pass therein as movables *John Mowlem & Co* v *Commissioner of Sales Tax*[2]. If the terms of the contract indicate that the contractee is not to be the owner of the product contracted or built upon by the contractor and if the property in the finished product vests in the contractee even during the process of construction, the transaction is clearly a works contract and does not involve any sale."

In the light of the above, it is unnecessary to multiply references The Board relies on the decision in *Udani Engineering Co* v *State of Madras*[4] There it was a case where there was no stipulation for labour made even though it was a works contract. This weighed with the learned Judges who decided the case The march of law thereafter and the defined view of the Supreme Court as above cited as also the principles laid down by this Court do not lend support to the conclusion arrived at by the Board that since the bill contains a disclosure as to the price of the articles supplied, they should be deemed to have been sold for such a price. Even the amount indicated in the bill does not represent the price of goods alone. It includes charges for work and labour The Board has not considered whether the amount disclosed can be severed and separated, so that distinctly a reckoning can be made analytically as to how much of it constitutes the price of articles and how much represented the charges for work and labour It is no doubt true that if the particulars in a given contract is so separable, then it could be separately considered and the correct law applied to the same so as to bring such a turnover to tax or not The Board has not considered the turnover in question in this perpective either In our opinion, the *ratio decidendi in Udani Engineering Co* v *State of Madras*[4] is not applicable to the facts of this case As the merits of the appeal have to be re-assessed and examined, it is necessary that the case should be

1 (1965) 2 S C R 167 (1965) 16 S.T.C 240.

2 (1967) 19 S T C 59

3 (1967) 1 S C R 543 (1967) 2 S C J 401 (1967) 19 S T C 13

4. T C No 55 of 1960.

remanded to the Board for fresh disposal in the light of our observations as above and in the peculiar circumstances and facts of this appeal Accordingly the order of the Board is set aside and the appeal remitted to the Board for a fresh consideration in the light of the law as set out above and after full examination of the facts There will be no order as to costs

R.M. —————— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Kishinchand Chellaram and others .. *Petitioners**

v.

The Joint Commercial Tax Officer, Chintadripet Dn , Madras-2 and others . *Respondents.*

Madras General Sales Tax Act (I of 1959)*—Schedule III, Item* 4*—' Artificial silk '——Terylene, Decron, Nylon, etc if would come within the expression ' Artificial silk '*

Interpretation of Statutes—Words of common usage—Meaning to be attributed in statutes.

'Artificial silk ' as is now commonly understood is a generic term for man-made fibre or filament yarn and it would not matter very much whether such yarn or textile has as its base a chemical or a natural product like cellulose Even synthetic fibres having mineral oil or petro-chemical as their base like Terylene, Decron, etc classified as polyster fibre, will also come within the expression ' artificial silk.' This is the sense in which it has been understood by the several departments of the Government of India, by experts in the field and in the several Statutes like the Indian Tariff Act (XXXII of 1934), Central Excise and Salt Act, 1944, etc.

Words that are in popular and every day use when found in Statutes, are to be interpreted in their popular sense, as understood by people conversant with the subject, and not in their peculiar or extreme scientific meaning.

Petitions under Article 226 of the Constitution praying the High Court to issue a writ of prohibition restraining the respondent from taking any further steps in pursuance of the notice No. 48316/65-66 proposing revision of the sales-tax assessment of petitioner in respect of years 1961-62, etc , in respect of Terylene, etc.

V. K. Thiruvenkatachari for *K. C. Jacob, S K. L Ratan* and *R Vedantam,* for Petitioner.

The Advocate-General, *Govind Swaminathan* the Special Government Pleader, for Central Government, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J —In this batch of writ petitions, the main question arising for consideration is whether Terylene, Terene, Decron, Nylon, Nylex, etc. would come within the expression " artificial silk " which occurs as item 4 in the Third Schedule to the Madras General Sales-Tax Act, 1959 and therefore exempt from sale-tax, main arguments were addressed in W.P. No 2927 of 1966, and as the point for consideration in all the writ petitions in this batch is the same, we intend considering the respective contentions of the parties as urged before us in W.P No. 2927 of 1966. It is not in dispute that notices which were similar to those issued in W P No 2927 of 1966, were issued to the other writ petitioners in this batch of petitions, and therefore we intend passing a common order considering the con-

*W.P. No 2927 of 1966. 25th August, 1967.

tentions of the respective Counsel for either side in the main W.P No 2927 of 1966.

The petitioner in this case has made the assessing officer as the first respondent, the State of Madras as the second respondent, the Union of India as the third respondent, the Central Board of Revenue as the 4th respondent, and the Collector of Central Excise as the 5th respondent The petitioner's case is that in or about September, 1966, he was served with notices by the first respondent calling upon him (1) to furnish particulars of sales of turnover in Terylene cloths for the years 1961-62 1962-63, 1963-64, 1964-65 and 1965-66. The notice recited that such particulars were required for purposes of revision of assessment for those years, as the turnover in Terylene cloths is taxable under the Madras General Sales-Tax Act, 1959, (2) The second notice is more telling in that it has included the reasons why the first respondent was issuing the said notice In the second notice, the first respondent would have it that Terylene and Nylon fabrics are made from synthetic fabrics produced from chemicals and not from common natural bases, and therefore they do not come under any of the classes of goods specified in item 4 of the Third Schedule to the Madras General Sales-Tax Act, 1959 which are exempt from tax under the Act As the normal conclusion to be deduced from the above notices issued by the first respondent is that the first respondent as the assessing authority has already made up his mind to revise a closed assessment and impose a fresh impost on Terylene and other class of goods on the fact that they are not exempt from taxation under the Madras General Sales-Tax Act, the petitioner has come up with the writ petition under Article 226 of the Constitution of India for the issue of a writ of prohibition interdicting the first respondent from proceeding with the action proposed by him by the two notices as above. The petitioner contends that the goods in question are artificial silk, classifiable as artificial silk, and have been deemed and understood to be so in the trade, by Government and even by experts, and that therefore, the decision unilaterally taken by the first respondent as if the goods are not covered by the expression 'artificial silk' is highly arbitrary. It is also contended that with reference to the various enactments like the Additional Duties of Excise (Goods of Special Importance) Act 1957, Act, LVIII of 1957, the Central Excise and Sale Act, 1944, the Central Sales Tax Act, 1956, these goods have been considered, understood and treated as artificial silk, and therefore the first respondent's attempt to bring such goods into the net of taxation, in spite of the exemption granted by the Act, is illegal. Reference was also made in particular to the stand of the Union Government which has consistently held that Terylene, Terene, Decron, Nylon, Nylex, etc are artificial silk fabrics for purposes of excise duty. The petitioner urged that it is imperative on the part of respondents 1 and 2 to follow a uniform practice on a par with the Union Government and that they are obliged under Article 261 of the Constitution of India to provide full faith and credit for public acts done by the Union of India in the instant case. The petitioner's further case is that the scope of serial No. 4 of the Third Schedule to the Madras Act regarding the varieties and forms of textile is the same as the scope of the three items in the Central Excise enactments and referred to by him in his affidavit. The petitioner also states that if the State of Madras is allowed to levy sales tax on these goods, it would mean a levy of tax which the State had no authority to levy. To this the first respondent has filed a counter His contention is that the goods in question are liable to tax under the provisions of the Madras General Sales-Tax Act He states that these goods do not come under the nomenclature of artificial silk. His main contention is that Terylene, etc. belong to a class of synthetic man-made fibre which is neither cellulosic or non-cellulosic filament yarn According to him, they belong to a class of polyamide or polyester group whose basic material is a petro-chemical and not a natural product The first respondent therefore contends that the goods are not artificial silk. He also states that as the question involves a finding of a jurisdictional fact and which has to be determined only by the assessing authority, the petitioner cannot invoke the jurisdiction of this Court under Article 226 of the Constitution to find the same. He states that it is primary for the assessing authority to decide whether a particular transaction involve sale of

artificial silk and that the onus is upon the petitioner to establish that the goods do come within the expression "artificial silk."

The 2nd respondent, the State of Madras, in its affidavit supporting the first respondent, states that the State Government is not subjecting to tax any items of goods which are declared to be subject to the provisions of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. It is submitted that the goods which are the subject matter of these writ petitions are not artificial silk The State Government also adds that the levy of additional excise duty on these types of goods would not invalidate the levy of sales tax by the Government. It is open to the State Government in the event of the Union Government not agreeing on the interpretation to be placed on the entry in question to forego a proportionate levy in respect of the actual excise duty on the goods in question.

The 5th respondent, the Union of India, completely supports the petitioner. Its case is that man-made fibres like Nylon, Terylene, Terene, Decron etc. are all considered as artificial silk and factually and technically the above products are textiles coming under the category of artificial silk It categorically says that by virtue of agreement between the State and the Central Government, the Central Government is collecting the additional excise duty on these fabrics and distributing a portion of the same out of the consolidated funds to the State and that in respect of these fabrics the State cannot levy sales tax. It is on such pleadings the parties have addressed arguments We should at the outset confess that the learned Advocate-General representing respondents 1 and 2 could only make cryptic arguments in answer to the detailed submissions by Mr. Thiruvenkatachariar, learned Counsel for the petitioners Mr Govind Swaminathan appearing for the Union of India supported the petitioner's case and contended that the products in question are classifiable as artificial silk and are assessable only as such Mr. V. K. Thiruvenkatachariar took us meticulously through the views held by many authors, including that entertained by the trade, the Government, as also experts, who would uniformly opine that the products under consideration are ordinarily understood to be textiles and come within the descriptional nomenclature of 'artificial silk' The primordial consideration in such circumstances to find the meaning of the goods under review is what is the popular understanding of such words. If, according to this test and other standards as applied by the industry, by Government authorities and by the populace the words in question cannot be taken out of the expression 'artificial silk' then they have to be understood as such. Bearing in mind also the principle laid down by the Supreme Court in *The Commissioner of Sales Tax, Madhya Pradesh, Indore* v. *Jaswant Singh Charan Singh*[1], that the construction of words in a statute is to be adopted to the fitness of the matter of the statute, we shall now consider the material placed before us which form the source of authority to find whether Terylene, Terene, Decron, Nylon, Nylex etc do come within the umbrage of artificial silk.

"Artificial silk" according to the Oxford Concise Dictionary, 3rd Edn 1934, means silk drawn by various processes out of viscid matter In the 5th Edn. of the same dictionary of 1964, "Artificial silk" is explained as "now known as Rayon" and means thread or yarn made from cellulose "Silk" is explained as equivalent to soft, lustrous, as silk In the Shorter Oxford Dictionary, 3rd Edn. 1944 the meaning of 'Nylon' is given as proprietary name; a synthetic fibre, similar to rayon " Even so 'terylene' has been explained as meaning trade name of dress fabric derived from polyster of terrephthalic acid and ethylene glyid In Van Nostrand's Scientific Encyclopaedia, 2nd Edn. 1947 at page 1002, 'Nylon' is described as that which is silky in appearance, relatively insensitive to moisture, and of superior elastic recovery better than silk In the Encyclopaedia Britannica, 1961 Edn Vol 21, under the heading "Synthetic fibric" we find that Rayon is said to be one such man-made fibre or filament from cellulose (wood pulp) which has some vegetable origin Synthetic fibres are classifiable under cellulosic fibres and non-

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1 (1967) 19 S.T C 469.

cellulosic fibres and Nylon is said to belong to the group called synthetic protein like fibres The name 'nylon' which has been given to this group is defined as a generic term for any long chain, synthetic, polymeric amide which has recurring amide groups as an intergral part of the main polymer chain, and which is capable of being formed into a filament in which the structural elements are oriented in the direction of the axis The other fabrics with which we are concerned are also wholly synthetic It is therefore argued that the test of a artificiality is fully satisfied. Learned Advocate-General however contends that the basic constituent of the products under consideration is 'mineral oil' and not cellulose or non-cellulosic material This distinction and classification appears to us to be a distinction without a difference in so far as this case is concerned "Artificial silk" is now commonly understood as a generic term for man-made fibre or filament yarn It would not very much matter, therefore whether the textile under consideration has as its base a chemical and natural product The learned Advocate-General invited our attention to an article by Sri Humayun Kabir, the then Minister for Petroleum and Chimicals, Government of India, under the caption "Petro-Chemicals" Petro-chemical industry according to the learned exponent is essentially a Second World War phenomenon He adds.

> "Till the beginning of the Second World War, coal was the main basis for chemical industries. Since then, oil is gradually replacing coal, as raw materials obtained from oil resources are cheaper and more abundant This has led to the development of a new type of industry under the general name "Petro-Chemicals".

The article continues:

> "All synthetic fibres begin with the preparation of polymer which consists of extremely long chain like molecules Synthetic fibres have been divided into several classes such as polyamides, polyster, and polyvinylics according to their chemical nature .. . .. . Polyster fibre is useful in blending with wool and cotton. *Its Durability, its retention of crease and its blending properties make it extremely useful for Textiles of various types.*" (The italicising is ours).

In our opinion, this article cannot support the Revenue at all In fact, this supports the view that notwithstanding the base being mineral oil or petro-chemical, yet, synthetic fibres obtained by such adaptation are classified *inter alia* as polyster fibre, to which class Terylene belongs, even according to the Oxford Dictionary. Learned Advocate-General then invited our attention to another article under the caption "Survey of man-made fibre industry" by Dr. A. N. Kapur, Executive Director, National Research Development Corporation of India The following excerpts therein are useful in the instant case:

> "Man-made fibre are classified in the three major categories—non-cellulosic and mineral fibre.
>
> Cellulosic fibres are viscose rayon and staple, acetate rayon and staple and cupramanoium rayon. Viscose rayon is the first man-made fibre and in terms of production and consumption is now the world's second fibre cotton being the first Nylon is the first organic synthetic fibre to be commercially produced. . Terylyne, Decron etc, are the same chemically and the chemical base is polyterylene".

Even this learned author classifies mineral fibres also as synthetic fibre. Excepting that mineral fibres is one species of genes, there can be no distinction whatsoever made between synthetic fibres belonging to one class or the other, having different bases for their manufacture Thus, mineral fibre is as much a man-made synthetic fibre as any other made fibre

We shall now consider the problem posed with reference to the several notifications issued by the Government Officers and Tribunals who are undoubtedly conversant with the subject matter.

The Central Board of Revenue is of the opinion that Nylon is artificial silk and nylon fabrics will be assessable to duty as artificial silk fabrics—*Vide* Board's letter No 5/1/56-CXMI, dated 1st February, 1956 printed in C B R's bulletin for the period of January to March, 1956 at page 39 Even so, the Board will say that Terrylene or Decron fabrics are to be classified as artificial silk Vide Board's letter No 38/1/62 CX-11, dated 24th January, 1962, printed at page 39 of the C B R's bulletin for the period January to March, 1962 The Textile Commissioner, Bombay, as an officer of the Ministry of Commerce, Government of India, has clearly stated apparently on enquiry that "Terylene, Terene, and Decron—fabrics are manufactured from polyster synthetic fibres or filament yarn. Terylene, and Decron are the Trade Marks of polyster fibre filament yarn, and according to common parlance, artificial silk' includes Terylene, Terene and Decron fabrics and they do fall under the category of man-made non-cellulosic fibre-filament yarn". *Vide* Government of India, Ministry of Commerce, Office of the Textile Commissioner letter No 1/64/ASB/G/Vol III, 2799, dated 20th/21st December, 1966. Again, another Government official on an enquiry by the trade, says as follows.

"I am directed to inform you that Terrylene, Terene and Decron fabrics and manufactured from polyester non-cellulosic filament are art silk fabrics as per the Art Silk Textiles (Production and Distribution) Control Order, 1962.

Vide Government of India, Ministry of Commerce Textile Commissioner's Letter No 1/64/ASB/G/Vol III/2 dated 3rd January, 1967. The Inspector Central Excise, Gwalior Rayon, Gwalior, in his letter No. 22/67 dated, 16th February, 1967, addressed to the manufacturers would say that Terylene, Nylon, etc, fabrics are assessed under tariff item 22 of Central Excise and Salt Act, 1944 under description Art Silk Fabrics."

The contention of the first respondent that since Terylene, Terene, Decron, and Nylon belong to the class of synthetic man-made fabric which is neither cellulosic nor non-cellulosic, but belong to the class of polyamides and polysters and since their basic material is petro-chemical or oil it should be classified not under artificial silk, is something which cannot be countenanced in view of the classification and categorisation made by expert Government officials who are expected to consider the nature of these products from time to time. Even otherwise, industrial journals, to which we have made reference already, do hold a contrary view In fact, the Deputy Director acting for the Textile Commissioner, Bombay, would say that these products are polyster non-cellulosic art silk fabrics.

Having thus considered the views of the various and prominent Government officials, it is also necessary for us to advert to the popular understanding of these words, particularly in the commercial field. Several letters have been produced before us by the learned Counsel for the petitioner to the effect that the products under consideration is the brand name of polyster fibre and that it is included under the caption of art silk fabrics As many as 12 letters have been produced from various commercial firms of repute in Calcutta, Bombay, Bangalore and Madras. It is unnecessary for us to consider in detail each one of these letters The main purport and purpose of the production of such letter is to impress upon us that popularly these textiles are understood as man-made non-cellulosic fibres or filaments and that each manufacturer adopts a trade name for the goods manufactured by him It is conceded that these products are polyster fibres; but nevertheless they are classified as art silk fabrics and they have been understood for years in the trade as such It appears, therefore, that notwithstanding the fact that the basis of the products under consideration is oil, petroleum or mineral in nature, that would not be sufficient by itself to take it out of the category of man-made fibres

At this stage it would be convenient to refer to the various statutes, particularly the taxing statute which for a considerable length of time have been grouping these goods, Terrylene, Terene, Decron, Nylon under the category of and caption of 'Rayon' or "artificial silk."

In the Indian Tariff Act, 1934 (XXXII of 1934) the words 'art silk yarn', appears. By this was meant Rayon or such other man-made fibre is clear from the dictionary meaning of the term. Under the Central Excise and Salt Act, 1944 "artificial silk" is correlated to Rayon and is meant to include all varieties of fabrics manufactured either wholly or partly from rayon or artificial silk—*vide item* 32 of Schedule I to the Central Excise and Salt Act, 1944. Section 14 of the Central Sales tax Act, 956 adopts the above definition for rayon or artificial silk and declared it as one of the goods of special importance in inter-State trade and commerce Even so, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, adopts the same meaning for artificial silk as equatable to rayon. That rayon is man-made and thus synthetic fibre is not in dispute. Thus the above Acts of Parliament always treated the products in question *in pari materia* with rayon and levied duties on them as artificial silk. The Revenue however presses into service the definition of 'artificial silk' in Art Silk Textiles (Production and Distribution) Control Order, 1962. The definition reads thus:

> " (*a*) 'art silk yarn' means yarn manufactured from cellulosic and non-cellulosic materials (*a*) man-made cellulosic spun fibre yarn (*b*) man-made non-cellulosic spun fibre yarn, (*c*) man-made cellulosic filament yarn, and (*d*) man-made non-cullulosic filament yarn.
>
> (*b*) 'Art silk cloth' means any fabric made wholly from art silk yarn or partly from art silk yarn and partly from any other yarn provided such fabric contains not less than 60 per cent of art silk yarn "

The observations of the Supreme Court in *State of Gujarat* v *Sakarwala Brothers*[1], that where a statute gives a definition, the common meaning has to be ruled out are relied upon. In Art Silk Textiles (Production and Distribution) Control Order, the main aspect involved is one of control of production of particular varieties of art silk cloth. The enumeration therein is illustrative but not exhaustive of man-made fabrics and cannot be availed of to interpert the normal meaning of artificial silk appearing in the Schedule to the Madras General Sales Tax Act. Even otherwise being a specific definition it cannot control the meaning of art silk used in legislation from 1934 onwards.

The Revenue hesitantly urged that in these writ petitions, a jurisdictional fact, the finding of which is exclusively within the comptence of the Revenue, is being sought to be found by this Court which is ordinarily not expected to assess facts which are within the comptence and purview of the assessing authority It has to be remembered that Courts are to foster justice and right a wrong The assessing authority in this case has made up its mind and it appears from the record that it has already exercised its jurisdiction, having assimilated the facts attendant thereto and has indeed decided to re-open the assessment for the earlier years and impose sale tax on the textiles in question, on the foot of there being no exemption available to the petitioner under item 4 of the Third Schedule to the Madras General Sales Tax Act, 1959. Such a pre-determination of the alleged jurisdictional facts infringe certain vested rights in the petitioner. No doubt, a jurisdictional fact is one, on the finding of which, the jurisdiction of the concerned Tribunal, depends. But it is now well settled that Court's powers to determine the correctness of such facts are still preserved even though the initial authority had adverted to it, acted upon it and come to one or the other decision or conclusion It is not to be forgotten that that by such assessment of the jurisdictional fact, rightly or wrongly, the assessing authority sets the law into motion The latter relative motion of law has to be interdicted in a deserving case by Courts exercising extraordinary jurisdiction under Article 226 of the Constitution if on a *prima facie* review of the relative and relevant facts, it is found that the jurisdictional fact has been erroneously found by the concerned Tribunal. In other words, if the assessing authority is not right in having assumed jurisdiction, it is to levy sale tax on its own self-serving finding that Terrylene Terene, Decron, etc, are not artificial silk, then a writ of prohibition can issue in order to avert the application and commandment of law, resulting from such an

1. (1967) 19 S.T.C. 24

erroneous assumption of jurisdiction We are therefore unable to agree with the learned Counsel, that these writ petitions are not maintainable.

After having thus gathered the necessary material to find out the true import, content and meaning of the expression " artificial silk " and from the interpretation given to it by the trade, experts, Governmental departments, as also statutory reference thereto ever since 1934, it is very difficult to accept the contention of the Revenue that artificial silk cannot mean and include the products under consideration. No doubt, departmental ruling by themselves cannot be a guide to Courts to find out the true meaning of words. But the meaning which the trade, Government officials and statutes, attribute to the words 'artificial silk' must be taken to be the ordinary and popular meaning of the same It cannot be denied, and it is equally undeniable, that the above group of personnel are persons conversant with the subject-matter and therefore the meaning they have given to the expression 'artificial silk' should be taken to be the meaning which should be attributed to it. From the opinion expressed in well-known journals and by experts, it is clear that though Terrylene, Terene, Decron, Nylon etc, have petro-chemical as its base, it is nevertheless a polyster fabric which is certainly synthetic fibre and therefore is classifiable as artificial silk. We have recently held in *Kannappa Mudaliar* v. *State of Madras*[1] that the popular understanding test prevails over others whilst appreciating the real purport and intent of words used in popular parlance and engaged in a taxing statute. We have also observed that:

" Care should be taken in interpreting the word for legal purposes, and particularly under the subject of taxation and while vivifying that word, the popular understanding of it should be rather pressed into service rather than its botanical, scientific or technological signification "

In the Madras General Sales Tax Act, 1959, or even in the enactments earlier thereto, and not even in the Central Sales Tax Act, 1956, the import and content of the words Terelyne, Terene, Decron, etc, have been defined. In the absence of such definition, Courts are bound to have recourse to the meaning attributable to such a word by persons who are dealing in such goods and utilising such goods. In other words, the extreme, peculiar and scientific meaning of the goods which might sometimes deviate from the popular meaning cannot prevail. Ordinarily Courts when called upon to interpret the meaning of such words, mainly rely upon their popular or ordinary meaning given to them. As pointed out by he Supreme Court of India in *Ramavatar Rudhaiprasad* v *Assistant Sales Tax Officer*[2], these words being words of every day use it will be construed in its popular sense meaning " that sense which people conversant with the subject-matter *with which the statute is dealing would attribute to it* ". (The italicising is ours).

In the instant case, we are confronted with the expression 'artificial silk' which has a special connotation of its own. It satisfies the popular understanding test in that it is understood as ordinarily mill textiles and which is a man-made fabric, may be the base either viscose or mineral oil Such overwhelming authority is available that it would not be safe to take out artificial silk appearing as item 4 in the Third Schedule to the Madras General Sales Tax Act, 1959, totally out of the popular context and meaning attributed to it and accept the contention of the Revenue that the articles under review are not artificial silk The Central Government which has been made a party to these writ petitions categorically avers that Nylon, Terrylene, Terene, Decron, Nylex etc, are considered as artificial silk being man-made fibres and that this view has been prevalent throughout India about the classification of these fibres and adds that even factually and technically, the products are textiles coming under the category of artificial silk These goods are subject to the additional duty of excise under the Additional Duties Excise (Goods of Special Importance) Act, 1957, and there has not been any controversy about the character of the goods at any time. They are of the view that by virtue of the agree-

1. Since reported in (1968) I M L J. 6 27 (1962) 1 An W R (S C) 27 (1961) 12
2 (1962) 1 S C J 43 (1962) I M L J (S C.) S T C 286

ment between the State and the Central Government, the Centre is collecting the additional excise duty on these fabrics and distributing a portion of the same out of the consolidated fund to the State, and that in respect of these fabrics the State cannot levy sales tax It is a fundamental canon of law that whilst it is possible for both the Centre and the State to interpret upon and explain certain words or expressions used in taxing statutes amongst others, a certain uniformity should prevail in order to avert inconvenience and harassment resulting to the persons affected by such an interpretation or ruling Article 261 of the Constitution of India is a pointer to this effect and provides that full faith and credit shall be given throughout the territory of India to public acts of the Union and of every State It cannot be disputed seriously that the opinions and the decisions taken by the Government of India under the Indian Tariff Act and the Excise Acts are such public acts It is also significant to note that the Additional Duties of Excise (Goods of Special Importance) Act was passed after a deep consideration of the mutual interests and benefits the Centre and the State should and ought to derive by such an imposition This is seen from the Finance Commissioner's Report proceeding the passing of the Additional Duties of Excise (Goods of Special Importance) Act and this is also referred to in the counter-affidavit filed on behalf of the Central Government Such being the essence of the bargain between the Centre and States, when the Additional Excise Duty was imposed on artificial silk, it is not ordinarily open to the State, who did not at any time choose to impose a levy on the products under consideration ever since the passing of the Madras General Sales Tax Act, 1959, to take up a view contrary to that of practice, and understanding and arbitrarily decide to levy sales tax on goods in question on the foot that they are not artificial silk The notices issued by the first respondent calling upon the petitioner to submit his accounts from 1961 for purposes of revision of concluded assessment and also the notices issued to the petitioner for the year 1965-66 calling upon him to furnish details of the turnover in the products under consideration stating that they are liable to assessment at different rates are certainly notice issued by the first respondent without jurisdiction and in any event is a public act done by him derogatory to the accepted practice and in particular violative of Article 261 of the Constitution. In our view, no distinct, independent and telling circumstances have been brought to our notice which compel the Revenue to reopen the assessment of the petitioner from 1961 in order to impose a new levy on Terylene, Terene, Decron, etc , on the only ground that they cannot be considered or deemed to be artificial silk Such a bare arbitrary and subjective satisfaction on the part of the first respondent cannot be allowed to run its course When a Tribunal has assumed in itself jurisdiction when it has none and is threatening in pursuance of such assumed jurisdiction to do an act which is violative of the vested rights of a citizen, then the Courts can and ought to interfere under Article 226 of the Constitution of India and issue a writ of prohibition to interdict such authority from exercising such illegal jurisdiction We are, therefore, satisfied in the circumstances of this case, that the purported exercise of jurisdiction by the first respondent to levy the impost on Terylene, Terene, Decron, Nylon etc , and the impugned notices issued by him are totally violative of the rights of free trade and is obviously in the exercise of jurisdiction when he has none The rule *nisi* issued, therefore, is made absolute and W P No 2927 of 1966 is allowed with costs

The other writ petitions were also heard along with the above. No fresh arguments were addressed either for or against the petitioners in the remaining cases. Following the reasoning as above, W P Nos 2928, 2934, 2935, 2956 to 2963, 2993, and 2994 of 1966 and 48, 50, 51, 60, 101 to 103, 129, 138, 139, 156, 214, 215, 216, 237, 238, 245 to 257, 260, 380, 433, 434, 444, 551 to 554 and 642 to 645 of 1967 are allowed with costs-one set Counsel's fee Rs. 250.

R M. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Purushotham Chettiar .. *Appellant**

v.

Ramanuja Padayachi and others .. *Respondents.*

Evidence Act (I of 1872), section 65—Applicability of—Secondary evidence regarding contents of document, when can be given—Suit on registered copy of mortgage, alleging loss of original—Plea of loss found untrue—Defendant admitting in his written statement the execution of mortgage and pleading partial discharge—Whether suit can be decreed on such admission—Admission has to be accepted or rejected as a whole.

Civil Procedure Code (V of 1908), Order 7 rule 14, and Order 7, rule 18—Plaintiff not producing document in his possession—Effect of—Whether entails dismissal of suit.

Where a document on the basis of which a suit is laid has been lost or is not in the possession of the plaintiff, the various clauses of section 65 of the Evidence Act would come into play But even where those conditions do not apply, if the condition or the contents of the original have been admitted in writing by the person against whom it is proved or by his representative-in-interest, secondary evidence could be given about the contents of the document and the admission of the person against whom it is proved can itself be relied upon for holding that the facts so admitted have been proved The admission has to be accepted or rejected as a whole, but that applies only to the contents of the document itself and not to matters which are not contained in that document though it might relate to or be connected with the document which is said to have been lost.

There is no rule of law that if a plaintiff, who has a document in his possession, does not produce it, the suit has necessarily to be dismissed. The provision regarding the consequence of non-production by the plaintiff of a document in his possession as required under Order 7, rule 14, is provided in Order, 7, rule 18.

Appeal against the decree of the District Court, South Arcot, Cuddalore in Appeal Suit No 396 of 1962, preferred against the decree of the Court of the Subordinate Judge of Cuddalore in Original Suit No. 12 of 1962.

R. Desikan and *A. C Masi Goundan*, for Appellant.

S. Thyagaraja Ayyangar and *V C Syamalam*, for Respondents

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit on a mortgage The suit mortgage, was executed by the first defendant on 23rd July, 1951 for Rs 6,000 The plaintiff alleged that the first defendant paid Rs 2,000 towards the mortgage on 30th July 1953, but had not paid the balance The first defendant claimed that in addition to the sum of Rs. 2,000 mentioned by the plaintiff, he had made another payment of Rs. 2,000 on 10th March, 1958 and had endorsed it on the mortgage He also contended that a promissory note for Rs 1,250 executed by him in favour of the plaintiff on 29th January, 1957 was also towards the interest due on the suit mortgage. The plaintiff filed the suit on a registration copy of the mortgage alleging that he had lost the original. Both the Courts below have found that the loss pleaded is not true. They have also found that the second payment of Rs. 2,000 pleaded by the first defendant was true and that the promissory note for Rs. 1,250 had nothing to do with the suit mortgage But the trial Court dismissed the suit holding that no secondary evidence could be let in regarding the contents of the suit mortgage. The lower appellate Court on the other hand has taken the view that the statement of the first defendant amounted to an admission of the execution of the mortgage and decreed the suit in part But in respect of the amount due on the promissory note, it has taken the view that the admission of the first defendant

*S.A No 1187 of 1964 and Memo. of Cross-objections. 14th March, 1968

has to be taken as a whole and therefore, this sum of Rs. 1,250 will also have to be deducted from the plaintiff's claim

The plaintiff has filed an appeal and the defendants have filed a memorandum of cross objections in respect of the portion decreed against them. All these findings being findings of fact, only two questions arise for decision in this case (1) Whether secondary evidence could be let in regarding the contents of the suit mortgage or at least the admission of the first defendant could be relied upon for purposes of decreeing the suit and (2) Whether the lower appellate Court was correct in disallowing the sum of Rs 1,250 due on the promissory note executed by the first defendant As far as the decreeing of the suit is concerned, I think the lower appllate Court is correct It has considered a number of decisions bearing on the point, that is, in *Chuni Kuar* v. *Udairam*[1], *Sri Ram* v. *Ram Lal*[2] *Mullu* v *Deokaran*[3]; *Kukmatullah Khan* v. *Abdul Azim Khan*[4], *Muhammad Zafar* v. *Zabur Hussain*[5], *Piarey Lal v Hira Dar*[6] *Hira Lal v Ram Prasad*[7], *Sundara Rajali* v *Gopala Thevan*[8], *Ananta Raguram* v. *Raja Bemmadevara*[9], *Brahmananda* v. *Kunduri Charas Das*[10]. The contention on behalf of the defendants is that as the original mortgage have been held by the Courts below not to have been lost, the plaintiff cannot succeed in the suit by producing the registration copy of the mortgage deed alone. Order 7 rule 14 of the Code of Civil Procedure is relied upon for this purpose. I do not accept the contention on behalf of the defendants that the failure of the plaintiff to produce the document in his possession or authority necessarily means that his suit should be dismissed. The provision regarding the consequence of non-production by the plaintiff of a document in his possession as required under Order 7, rule 14, is provided in Order 7, rule 18,which provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. It does not provide for the dismissal of the suit itself. See the decisions in *Gopal* v *Vishnu*[11], *Lakhpat Pathak* v. *Chiran Phathak*[12]. Under section 65 of the Evidence Act secondary evidence may be given of the existence, condition or contents of a document in the following cases:

> " (*b*) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest."

In this case the first defendant's admission amounts to an admission of the execution of the document, and the consideration for the document, as well as the payment of Rs 2,000 is admitted by the plaintiff As regards the payment of another sum of Rs 2,000 pleaded by the defendants, but not admited by the plaintiff, that also would have to be given credit to, because the admission of the defendants must be taken as a whole and it cannot be accepted in part or rejected in part See the decision of the Privy Council in *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*[13] where their Lordships have held as follows :

> " It is permissible for a tribunal to accept part and reject the rest of any witnesses testimony. But an admission in pleading cannot be so dissected and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all."

Therefore, as far as the payment of Rs 2,000 pleaded by the defendants is concerned, which they say was endorsed on the suit mortgage, that has got to be accepted, because the admission must be taken as a whole or rejected as a whole But the admission only as far as it relates to what is admitted to be found on the lost mortgage deed is relevant for the purposes of section 65 His contention regarding the

1 (1884) I L R 6 All 73
2 (1913) 11 All L J 255
3 (1913) I C 955
4 A I R. 1921 All 218
5. A I R 1926 All 741
6. A I R 1941 All 150
7. A I R 1949 All. 677
8 A I R 1934 Mad 100
9 A I R 1958 A P 418
10 A I R 1959 Orissa 126
11 I L R (1898) 22 Bom 971
12 A I R 1937 All 55
13 (1915) I L R 39 Bom 399 : L.R 42 I A 103 28 M.L J. 589

promissory note has nothing to do with the contents of the mortgage deed He did not say that that payment was endorsed on the suit mortgage So in seeking to give evidence about that promissory note, the plaintiff is not seeking to give evidence about the contents of the suit mortgage He is only seeking to give evidence about something which is outside the suit mortgage It is, therefore, not a case of his seeking to give secondary evidence of the contents of a document which has been lost He need not therefore rely upon section 65 (*b*) of the Evidence Act. Section 91 of the Evidence Act can have no application to the facts of the case. The evidence on this point on the side of the plaintiffs as well as on the side of defendants is admissible and a conclusion can be arrived at on the basis of that evidence Both the Courts below having found that the promissory note had nothing to do with the interest due on the suit mortgage, the lower appellate Court was not right in holding that it was compelled by authority to hold that because the first defendant's admission must be either accepted as a whole or rejected as a whole, it was bound to accept the defendants' story regarding the promissory note notwithstanding its finding on the evidence that that story was not true. It follows therefore, that the lower appellate Court was not right in disallowing the plaintiff's claim to the extent of Rs 1,250 represented by the promissory note by the defendants in his favour

The decision in *Sundara Rajah* v *Gopala Thevan*[1], relied upon by the lower appellate Court as well as by the defendants in this case is really not against this conclusion if it is properly considered There the defendant admitted the execution of the promissory note Both the plaintiff and the defendant agreed that there was a payment of Rs 35 in July 1924 But while the plaintiff claimed that there was another payment in May, 1926 or thereabouts, an allegation which was necessary in order to enable the plaintiff to save limitation, the defendant contended that he paid Rs 50 about the end of September, 1924 which payment was endorsed on the promissory note The promissory note in that case having been lost, the defendant's admission had to be accepted in full or rejected in full If the defendant's admission was accepted in full, the suit would be barred by limitation In the circumstances, the Court could not consider any other evidence and hold that the payment in May 1926 pleaded by the plaintiff could be true The admission then related to the contents of the lost document and no evidence apart from the admission of the defendant could be received The ratio of the decision is found in the following sentence in that decision

> " To treat the admission of defendant 1 that he and defendant 2 executed the pronote but to divorce it from his statement that the note was discharged except for Rs 10 that this payment was endorsed and that the suit was time bared would appear to contravene the principle laid down by the Privy Council in *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*[2] "

Therefore, this decision is no authority for the contention urged on behalf of the defendants that because the mortgage deed has been lost, no suit can be maintained on the mortgage The sentence in that judgment where the learned Judge remarks that the defendants did not admit that the lost pronote was the pronote, as it was described to have been at the time of its loss by the plaintiff was a reference to the fact that the admission by the defendants was only of a pronote with an endorsement on it, which would not save limitation and not an admission of a pronote with an endorsement on it which would save limitation The decision in *Ram Saran Das* v *Tulsi Ram*[3], relied upon by the learned Judge of this Court who decided the case in *Sundara Rajah* v *Gopala Thevan*[1], cannot also help the defendants in this case It is true that in that case, the Bench held that the promissory note on which the suit was based was not proved to have been lost and that secondary evidence of its existence and contents could not be given in spite of the admission of the defendant about the execution of the promissory note But the Bench has not considered the effect of the admission made by the defendant in that case and how far that

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1. A.I.R 1934 Mad 100. I L R (1915) 39 Bom 399
2. (1915) L.R. 42 I A 103 28 M L.J. 589 3 A.I R 1922 Lah. 417

admission could help the plaintiff in that case under section 65 (*b*) of the Evidence Act The decision of the Privy Council in *Bonnerji* v *Sitanath Das*[1], is not relevant for the purpose of this case. What their Lordships have held there is that where a proper case for admission of secondary evidence of the contents of a document had not been made out and objection had been taken to the reception of such secondary evidence, it is not permissible to go to other evidence for the purpose of indicating the contents of the written document There again the question of admission on the part of the defendant which would enable the plaintiff to give secondary evidence under the provisions of section 65 (*b*) of the Evidence Act did not arise and therefore has not been considered. As I already mentioned, the evidence regarding the promissory note is not secondary evidence. It does not relate to the contents of the lost document. The decision in *Brahmananda* v *Kanduri Charan Das*[2] cannot also help the defendants, because in that case apart from the executants, who admitted the execution of the bond, the minor sons of one of the executants were parties to the suit who did not admit the mortgage and put the mortgagee to proof of the mortgage and the payment of consideration thereunder and that is why it was held that in order to pass a mortgage decree against the minors it was absolutely necessary that the execution and attestation of the mortgage should be proved, because where a party to an attested document admits its execution a third party is not bound by such admission The decision in *Ananta Raghuram* v. *Raja Bommadevara*[3], was a case where the defendants pleaded ignorance of the execution of the document for all intents and purposes and that was held a denial of the execution of the document. That case also does not, thus, deal with a case of admission I may also refer to the decision in *Mull* v *Deokaran*[4], where it was held that a suit on the basis of a lost mortgage deed could be maintained where the defendant pleaded that the original was not lost, but had been suppressed as it contained an endorsement of payment on the ground that the pleading of the defendant amounted to an admission of execution of the document The case in *Pearey Lal* v. *Hira Dey*[5], was one where it was held that the written admission of the contents of the document, sought to be produced, has to be the admission of the person against whom it is sought to be proved, and not by any other person In the present case the admission is by the executant himself The other defendants have not questioned the execution at all It is not necessary to refer at length to the other decisions considered by the lower appellate Court The principle that emerges from a consideration of these decisions and the relevant provision of law is that where a document on the basis of which a suit is laid has been lost or is not in the possession of the plaintiff, the various clauses of section 65 of the Evidence Act would come into play But even where those conditions do not apply, if the condition or the contents of the original have been admitted in writing by the person against whom it is proved or by his representative in interest, secondary evidence could be given about the contents of the document and the admission of the person against whom it is proved can itself be relied upon for holding that the facts so admitted have been proved The admission has to be accepted or rejected as a whole, but that applies only to the contents of the document itself and not to matters which are not contained in that document though it might relate to or be connected with the document which is said to have been lost. There is no rule of law that if a plaintiff, who has a document in his possession, does not produce it, the suit has necessarily to be dismissed It follows, therefore, in this case that the plaintiff is entitled to succeed in his appeal and the memorandum of cross-objections filed by the defendants has to be dismissed

The Second Appeal is allowed in part with reference to the sum of Rs 1,250 alone and the Memorandum of cross-objections is dismissed The parties will bear their own costs. Time for payment 6 months No leave

S.V.J. ——— *Appeal allowed in part*

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1 (1922) 42 M L J 403 L.R. 49 I.A 46
2. A I R 1959 Orissa 126.
3. A I R 1958 A P 418
4 (1913) 20 I C 955
5 A I R 1941 All 150

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Kathoon Bivi Ammal and another .. *Appellants**

v.

Arulappa Nadar and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 11—Res judicata—*Two suits tried together——Issues raising common question and evidence being the same—Decision in one suit following the decision in the other suit—Appeal against decree in one suit only but not against decree in the other suit—Effect of——Whether decree in the suit not appealed against becomes* res judicata.

Contract Act (*IX of* 1872), *section* 208—*Principal cancelling agent's authority—Agent entering into contracts with third party—Third party not aware of termination of the agency—Whether agent's action binds principal.*

Held, the two suits were tried together by consent, the issues raised a common question, the evidence was the same, the decision in one suit followed the decision in the other suit, the effect of the appeal in one suit was in substance to get rid of the common decision and therefore, the fact that an appeal was filed only against the decree in one suit, but not against the decree in the other suit does not mean that the decree in the suit not appealed against became *res judicata*

The policy of the law is that the agent's action should bind the principal, even though the principal might have cancelled the agent's authority unless the third persons with whom the agent enters into contracts knew of the termination of the agency.

Appeal and Memorandum of Objections against the Decree of the Court of the Subordinate Judge, Tirunelveli, dated 10th March, 1964 in Appeal Suit No. 327 of 1963 preferred against the decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 42 of 1962, dated 30th January, 1963.

R. Gopalaswami Iyengar, for Appellants.

S. Tyagaraja Ayyar, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of O S. No. 42 of 1962. Defendants 2 and 1, who are husband and wife are the appellants. The first defendant filed O.S. No. 17 of 1962 against her step-daughter, Fareeda Beevi, her husband and the plaintiff in O.S. No. 42 of 1962 for a declaration that the two mortgage deeds executed by her step-daughter's husband, the third defendant in that suit, one in favour of her step-daughter, the first defendant in that suit, and the other in favour of the second defendant in that suit, who as already mentioned is the plaintiff in O.S No. 42 of 1962, were void and not binding on her. The third defendant in that suit was her power-of-attorney agent and in that capacity, he executed the mortgages in favour of the first and second defendants in that suit. On the ground that they had been executed by him after she had cancelled the power-of-attorney in favour of the third defendant that suit was decreed and there was no appeal. against it either by the first or by the second defendant. O S No 42 of 1962 was filed by the second defendant in O.S. No 17 of 1962 against the plaintiff in O.S. No 17 of 1962 as the first defendant, her husband as the second defendant, a tenant under the first defendant as the third defendant and the son-in-law of defendants 1 and 2 as the fourth defendant, this son-in-law being the third defendant in O.S. No 17 of 1962. O S. No. 42 of 1962 was dismissed. As against that dismissal, the plaintiff in O.S. No. 42 of 1962 filed an appeal and that appeal was allowed and the suit decreed. Defendants 1 and 2 have, therefore, come upon appeal to this Court The trial Court held that the first defendant had cancelled the power-of-attorney executed by her in favour of the fourth defendant on 2nd September, 1958, and that, therefore, the mortgage executed by the

*S A. No 1295 of 1964 and Memo. of Cross-objections — 23rd August, 1968.

fourth defendant in favour of the plaintiff was not valid But it gave a decree against the fourth defendant for the sum due on the mortgage. The lower appellate Court also held that the power-of-attoreny was validly cancelled though there seems to be some confusion in its mind with regard to this point as seen from its discussion in paragraphs 9 and 10 of its judgment. However, on the ground that under section 208 of the Indian Contract Act, the termination of the authority of an agent does not take effect, so far as regards third persons, before it becomes known to them. The cancellation would not bind him and consequently the mortgage deed executed by the fourth defendant in favour of the plaintiff was valid. But it gave only a charge decree for the mortgage amount. The plaintiff has, therefore, filed a memorandum of cross-objections and wants a decree for possession of the mortgaged property to be granted in his favour.

As both the Courts below have held that the power-of-attorney executed by the first defendant in favour of the fourth defendant has been validly cancelled by her even before the fourth defendant executed the mortgage in favour of the plaintiff, the only question that arises is whether under section 208 of the Indian Contract Act, such cancellation will have the effect of making the mortgage executed by the fourth defendant void as against the first defendant. Section 208 of the Indian Contract Act is as follows .

> 208 "The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them."

Illustration (*b*) to this section is as follows :

> "(*b*) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay and afterwards by letter, revokes his authority to sell and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B*, the money, with which *B* absconds. *C*'s payment is good as against *A*"

This illustration is apposite to the facts of this case. In Mulla on Indian Contract Act, Students' Edition, Eighth Edition, page 226, the case of *Trueman* v. *Loder*[1], is referred to That was a case where *A* traded as *B*'s agent with *B*'s authority all parties with whom *A* made contracts in that business were held to have a right to hold *B* liable to them until *B* gives notice to the world that *A*'s authority is revoked ; and it makes no difference if in a particular case the agent intended to keep the contract on his own account It is argued on behalf of the appellant that it is very unreasonable to expect that the first defendant should inform the whole world that she had cancelled the power-of-attorney given to the fourth defendant, and that she cannot be expected to approach everybody with whom the fourth defendant was likely to enter into contract and inform them of the cancellation. I do not think that such considerations have any relevance in the face of the clear words of the section. The policy of the law, apparently in the interests of trade and comme ce, is that the agent's action should bind the principal, even though the principal might have cancelled the agent's authority unless the third persons with whom the agent enters into contracts knew of the termination of the agency On this point, therefore, the conclusion of the lower appellate Court is correct, and it should be held that the mortgage executed by the fourth defendant in favour of the plaintiff is valid and binding on the first defendant

One point, which was strenuously urged by the appellants in this Court was that, this appeal is barred by *res judicata* The argument is put thus : The first defendant in O S No 42 of 1962 obtained a decree in O S No 17 of 1962 holding that the mortgage executed by the fourth defendant in favour of the plaintiff and Fareeda Beevi, who were the first and second defendants respectively in that suit (O S No 17 of 1962) was void and not binding on the first defendant, who was the plaintiff in that suit. There was no appeal against that decree. It has, therefore, become final and

1. (1840) 2 A. & E. 589.

operates as *res judicata* because the same question arises in this suit. On the other hand, it is urged on behalf of the contesting respondent that this question was not raised by the first defendant in his appeal before the lower appellate Court and that if she had raised that question he could at least have filed an appeal with a petition to excuse delay and that the appellants should, therefore, not be allowed to raise this question of *res judicata* in this Court. There is considerable force in this contention. But all the same I will discuss the question of *res judicata* that has been raised

There is no doubt that the question that arises for determination in this suit is the same as in O S No 17 of 1962. The present first defendant wanted a declaration that the mortgage executed by the present fourth defendant in favour of the present plaintiff was not binding on her This suit, O S No 42 of 1962, was for a declaration of the plaintiff's right in respect of that very *othi*. The following were the issues framed in O.S No 17 of 1962:

(1) Whether the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid?

(2) Whether the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void?

(3) Whether they were executed by the third defendant *bona fide* for purposes binding on plaintiff?

(4) To what relief, if any, is the plaintiff entitled?

The following were the issues framed in O S. No. 42 of 1962:

(1) Whether the 4th defendant was a power-of-attorney agent of the first defendant on the date of the suit mortgage bond? If not whether the said bond executed by him in favour of the plaintiff is void and unenforceable?

(2) Whether the said bond is sham and nominal and not supported by consideration?

(3) Whether the plaintiff is not entitled to delivery of possession of the suit properties?

(4) Whether the plaintiff is entitled to claim damages?

(5) Whether the amount of profits claimed by the plaintiff is excessive?

It would be noticed that issues 1 and 2 in O.S No 17 of 1962 and 1 and 2 in O.S. No. 42 of 1962 are in respect of the same question, though the wording of the issues is different in O S No 42 of 1962 and the onus is thrown on the plaintiff. Both the suits were tried together by consent and all the evidence was recorded in common. Both these sets of issues were discussed together by the trial Court and its finding is found at the end of paragraph 21 of its judgment in the following terms:

> "I hold on issue 1 in O.S. No. 17 of 1962 that the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid. On issue No. 2 in O S No 17 of 1962, I hold that the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void against the plaintiff. On issue 1 in O S No 42 of 1962 I hold that the 4th defendant was not a power-of-attorney agent of the first defendant on the date of the suit *othi* bond and that the bond is void and unenforceable against the plaintiff. On issue No. 2 in O S. No. 42 of 1962 I hold that the suit bond is supported by consideration and that the 4th defendant is liable to pay the *othi* amount to the plaintiff."

These two sets of issues are the crucial issues in the two suits, and the question that arises is the same in both the suits, that question being whether the power-of-attorney executed by the first defendant in favour of the fourth defendant, had been validly cancelled. Both the Courts have held that the suit mortgage bond is supported by consideration in the sense that the plaintiff has paid consideration towards it. I cannot, therefore, accept the contention on behalf of the appellants that issues in the two suits are different and the question that arises for decision is different in

the two cases. Therefore, the decision of this Court in *Panchandavelan* v. *Vaithinatha Sastrial*[1], would govern the facts of this case. There it was held that where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day, but separate decrees were passed and an appeal was preferred against one of the decrees alone that the decree unappealed did not operate as a bar under section 13 (present section 11) of the Code of Civil Procedure so as to preclude the appellate Court from dealing with the decree appealed against, and that the doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form is to get rid of the decision which is pleaded in bar The Full Bench that decided the case followed the decision in *Abdul Majid* v. *Jew Narain Mahto*[2], and by implication refused to follow the decision in *Gururajamman* v. *Venkatakrishna Chetti*[3]. The following discussion of this question is very apt to the facts of this case :

> " Technically, no doubt, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits, but the fact that the tenant only appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the District Judge from deciding upon the merits the questions raised in the appeal which was before him. The subject-matter of litigation in the two suits was the same, the evidence was the same, and the two suits were tried together. The reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his suit.
>
> We do not think that, either under section 13 of the Civil Procedure Code, or on general principles, the doctrine of *res judicata* has any application to the facts of this case The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide *res judicata* The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit."

In *Pappammal* v. *Meenammal*[4], the Bench which made reference to the Full Bench, had to consider this question They referred to the decision in *Panchandavelan* v. *Vaithinatha Sastrial*[1], and pointed out that Full Bench had clearly indicated the principle to apply in the circumstances of the case that where the object of the appeal being in substance, if not in form, is to get rid of the very adjudication which is put forward as constituting *res judicata* that the adjudication should not be held to bar the appeal The Bench also added the qualification that the decision must have been rendered at the same time and the suits must have been tried together but it was not material that they must be cross-suits The Bench then referred to the decision in *Ramaswami Chetti* v. *Karuppan Chetti*[5] which followed the Full Bench decision in *Panchandavelan* v *Vaithinatha Sastrial*[1], and held that that decision is not to be confined to cross suits only but that it is equally applicable to suits between the same parties in which a common question is raised and decided and an appeal is preferred in only one of the suits Paragraph 1 of the head note in *Ramaswami Chetti* v. *Karuppan Chetti*[5], is to the following effect.

> " Where the matter in issue in two suits was the same and suits were tried together on the same evidence and disposed of by the same Judge, and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decree."

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1. (1906) 16 M L J 63 · I L R 29 Mad 333.
2. (1889) I L R. 16 Cal 233.
3. (1901) I L R. 24 Mad 350.
4. I L R (1943) Mad 235 · (1943) 1 M.L.J. 1 · A I R 1943 Mad. 139 (F B).
5. (1915) 29 M L J 551.

In the decision in *Lakshmi Ammal* v. *The Official Receiver, Tinnevelly*[1], Beasley, C J. referred to the sentence in the Full Bench judgment to the following effect.

> " It would lead to startling results if we were to hold that an appellate tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts but in a case other than the case under appeal, had given a decision which had not been appealed against, at the same time as the decision in the case under appeal"

and held that the doctrine of *res judicata* had no application when the very object of the appeal was to get rid of the decision pleaded in bar In *Narayanaswami Iyer* v. *Sevadappa Gounder*[2], the decision in *Lakshmi Ammal* v *The Official Receiver, Tinnevelly*[1], was followed. In *Chockalinga Thevar* v *Sankarappa Naicker*[3], it was held thus :

> " Where during the pendency of an appeal against the finding in a suit, the same issue had been raised and decided differently in another suit in the same Court later by a different judge and such later decision had been allowed to become final it will operate as *res judicata* in the appeal against the earlier decision."

But this decision cannot help the appellants because there were different decisions in different suits tried on different occasions by different Judges. In Mulla's Commentaries on the Code of Civil Procedure at page 38 of Edition 11, the learned author says :

> " The preponderance of judicial decisions in different High Courts is in favour of the view that the judgment not appealed against does not become *res judicata*. This is on the ground that a decision given simultaneously cannot be said to be a decision in a former suit "

In *Subbiah Udayar* v *Karuppiah-Udayar*[4], a Bench of this Court referred to the decision in *Badri Narayan Singh* v. *Kamdeo Prasad Singh*[5], relied upon by the appellants in this case and pointed out that that case related to two appeals arising out of one proceeding before an Election Tribunal the subject-matter of the appeals being different and separate decrees were drawn, and that there was one further appeal against the order in one appeal only, and remarked *Subbiah Udayar's case*[4] :

> " It was held that the finding in the unappealed decree would operate as *res judicata* The Supreme Court in that very decision has recognised that when there is a single suit, the question of *res judicata* does not arise merely because there are two decrees based on the same judgment."

The Bench referred to an earlier decision of the Supreme Court in *Narhari and others* v *Shankar and others*[6], where it was pointed out that the question of *res judicata* arises only when there are two suits and that even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit, that when there is only one suit, the question of *res judicata* does not arise at all and as that in case, both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit there was no question of the application of the principle of *res judicata*. The Bench held as follows :

> " Where there is only one *lis* the question of *res judicata* does not arise at all. Both the decrees in the instant case are based on the same judgment and matter decided concerns the entire claim The subject-matter in dispute between the parties in substance can be regarded as forming one *lis* only. By virtue of the peculiar procedure obtaining in regard to applications filed under section 42 of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) it has been the practice for such claimant to compensation money to file his own application.

1. (1934) 67 M L J 364.
2. (1941) 2 M L J 932
3. I L R (1942) Mad 677 : (1942) 1 M L. J 281.
4. I.L R. (1965) 1 Mad. 57.
5. (1962) 1 S C J 63 : (1962) 1 M.L J (S C) 39 : (1962) 1 An.W R (S C) 39 : (1962) 3 S C R 759
6. (1950) S C R. 754.

In such a case, the applications are consolidated for the purpose of hearing and a common judgment given. Both the applications in the instant case must be regarded therefore, as comprising a single controversy and that they should be regarded as constituting a single proceeding as the subject-matter is the same. There is no question of the application of the principle of *res judicata* to such a case "

The above decision and the discussion therein would show that the decision relied upon by the appellants in *Badri Narayan Singh* v *Kamdeo Prasad Singh*[1], has no application to the facts of this case Another case relied upon by the appellants is in *Sheodan Singh* v *Darvao Kunwar*[2] It was there held as follows :

"Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be *res judicata* and the appeal Court must be deemed to have heard and finally decided the matter In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits and if that is so, the decision of the appeal Court will be *res judicata.*"

That really does not apply to the facts of this case, as would be seen from paragraph 19 of that decision at page 1338 Their Lordships referred to the case in *Manohar Vinayak* v *Laxman Anandrao*[3]. In that case two suits were consolidated by consent of the parties and there were certain common issues. Appeal was taken from the decision in one suit and not from the decision in the other, and it was urged in the High Court that the decision in the other suit had become final. The High Court applied the principle that *res judicata* could not apply in the same proceeding in which the decision was given and added that by a parity of reasoning it could not apply to suits which were consolidated They pointed out that the view taken in *Panchandavelan* v *Vaithinatha Sastrial*[4], is similar to the one case in *Manohar Vinayak* v *Laxmin Anandrao*[3] and that they need not express an opinion as to their correctness The authority of the decision in *Panchandavelan* v *Vaithinatha Sastrial*[4], which has been consistently followed in this Court has not been shaken by either of the two decisions relied upon by the appellants. It follows, therefore, that in this case, the appeal is not barred by *res judicata* The two suits were tried together by consent, the issues raised a common question, the evidence was the same, the decision in one suit followed the decision in the other suit, the effect of the appeal in one suit was in substance to get rid of the common decision and therefore, the fact that an appeal was filed only against the decree in one suit, but not against the decree in the other suit does not mean that the decree in the suit not appealed against became *res judicata.*

The second appeal fails and is, therefore, dismissed The decree passed by the lower appellate Court is a charge decree and may be executed.

I do not think there is any justification in this case for allowing the cross-objections. The lower appellate Court has apparently taken the equities of the case into consideration After all the suit was decreed against the first defendant on purely technical considerations It is rather hard on her that notwithstanding the cancellation by her of the power-of-attorney given in favour of her son-in-law the fourth defendant she should be made to pay the plaintiff because of the fraud played by the fourth defendant The memorandum sof cross-objections is also dismissed. There will be no order as to costs.

No leave.

S V J. —— *Appeal dismissed.*

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1 (1962) 1 S C J 63 : (1962) 1 M L J (S C) 39 : (1962) 1 An W R (S C) 39 (1962) 3 S C. R 759

2. (1966) 2 S C J 768 , (1966) 3 S.C R 300 : A I R 1966 S C 1332

3 A I R. 1947 Nag 248

4 (1906) I L R 29 Mad. 333 : (1906) 16 M L J 63

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Saleh Bros. .. *Appellant* *

v.

K. Rajendran and another .. *Respondents.*

Transfer of Proprty Act (*IV of* 1882), *sections* 111 (g) *and* (h), 112, 113 *and* 116—*Law relating to waiver of forfeiture and waiver of notice to quit—Landlord issuing notice determining lease—Ejectment suit by landlord—Receipt of rent subsequent to notice and pending suit—Whether, by itself, amounts to waiver—Necessary ingredients to constitute waiver.*

The law relating to waiver of forfeiture and waiver of notice to quit is the same in England and in India.

The principle underlying section 112, that after the landlord had elected to avail himself of the forfeiture and had given notice in writing to the lessee of his intention to determine the lease and followed it up by a suit in ejectment there is no waiver, would equally apply to section 113 where the landlord has instituted a suit in ejectment, preceded by the issue of a notice determining the lease. The absence of a corresponding proviso, in section 113 is of no significance and does not manifest any intention on the part of the Legislature to make any difference. Under section 111 (*h*) the lease is determined on the expiration of the notice which can be given by the unilateral choice of one of the parties, there being nothing further to be done by the other party. The issue of such a notice, of its own force and without anything more, after the expiry of the period, determines the lease.

Acceptance of rent which has become due since the forfeiture is regarded as waiver of forfeiture under the main operative portion of section 112, because the acceptance of rent is an affirmance that the lease was subsisting at the time when the rent became due after the forfeiture. But this acceptance of rent, after the suit in ejectment is filed, is not regarded as a waiver, because, once the matter has come to the Court, the election has become irrevocable. The only thing necessary under the Second Proviso is that there must be an unequivocal demand for possession in the Court.

Obiter :—The principle, that once an election has been made and the lease determined the election is irrevocable, would apply even when the election is not followed by a suit in ejectment and if the lessor had merely given a notice in writing of his intention to determine the lease as provided in section 111 (*g*). If rent is subsequently received by the lessor, the rights of the parties will have to be determined in accordance with the provisions of section 116 of the Transfer of Property Act Once the lease is determined by the issue of the requisite notice, a contractual relationship thereafter can arise only with the consent of both parties. The irrevocable character of the election must follow in either case

The plain language of section 113 indicates that a waiver does not *ipso facto* result from any of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as subsisting It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. There is no warrant for the view that mere receipt of rent, whatever may be the intent on of lessor, should of its own force, divorced from the circumstances of the case, be regarded as amounting to a waiver. The receipt of rent may only create a presumption and cannot of its own force amount to a waiver. In order to constitute a waiver, both the limbs of section 113 must concurrently operate, which means, that an act by itself and of its own force,

*S.A. No. 1065 of 1964. 5th September, 1968.

without reference to the intention of the parties, cannot bring about a waiver. The principle underlying section 116 of the Act will also apply in applying section 113.

The preponderance of the weight of authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease as subsisting There should be either an express contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant Whether the conduct of the party justifies such an inference would undoubtedly turn upon the facts and circumstances of each case.

The circumstance that in the receipts issued by the owner, the word 'rent' is used is not decisive of the question.

Held, on facts, that it is impossible to attribute to the owner the intention either to continue the relationship of landlord and tenant or to create a new tenancy.

Appeal against the Decree of the Court of the Additional City Civil Judge, Madras, in Appeal Suit No. 200 of 1963, preferred against the decree of the Court of the IV Assistant City Civil Judge, Madras in Original Suit No. 1822 of 1958.

S Kuppuswamy, for Appellant.

A. Sundaram Ayyar and *V. N. Srinivasa Rao*, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit in ejectment and the tenant who failed in the Courts below is the appellant in the second appeal. The premises in question is situated in Sembudoss Street and the owner and landlord was one Kuppuswamy Naicker now represented by the plaintiffs in the action. By G O. No. 2216 (Home), dated 5th August, 1958, the Government issued a notification exempting the premises from the provisions of the Rent Control Act. The tenant filed two writ petitions, W P. Nos. 732 and 733 of 1958 to quash the order of the Government and the petitions were dismissed on 10th November, 1960 The tenant preferred Writ Appeals Nos. 156 and 157 of 1960 therefrom and they too were dismissed on 15th November, 1962. Meanwhile, on 6th October, 1958, within two months after the order of exemption by the Government, the plaintiffs instituted the suit O.S. No. 1822 of 1958 on the file of the City Civil Court, Madras, for recovery of possession of the property after giving notice, Exhibit A-1, dated 2nd September, 1958, terminating the tenancy. Pending disposal of the writ proceeding, there was an order of limited interim stay and after the final disposal of the writ proceeding the suit was taken up and disposed of. Several objections were raised by the defendant, the tenant, and only two points were argued before me in the second appeal One is that the suit is bad for want of proper notice to quit, the objection being that the notice terminating the tenancy by the midnight of 30th September, 1958 is bad in law. A perusal of the judgment of the Courts below shows that this point was not seriously pressed before the Courts below and it was also not shown how this notice was defective Before me too, the point was merely mentioned and when the attention of the learned Counsel for the appellant was drawn to the fact that in the grounds of appeal in this Court no objection has been taken touching this aspect, learned Counsel did not pursue the matter further Indeed the only point that was pressed before me is the point of waiver. The tenant has filed a batch of receipts in respect of rents paid from August, 1958 to November, 1962. The third of the series of receipts is dated 31st October, 1958 being the receipt of a sum of Rs. 212 50 towards the rent for the premises for the month of October, 1958. The argument on behalf of the tenant is that after the tenancy came to an end by the midnight of 30th September, 1958, the landlord has received the rent from the tenant for the entire month of October, 1958 and for the subsequent months and he should therefore be held to have waived the prior notice to quit thereby treating the tenancy as still subsisting. Counsel on both sides cited some

decisions touching this aspect as to whether or not this conduct of the landlord would amount to waiver

Learned Counsel for the appellant placed considerable reliance upon *Illustration* (*a*) to section 113 of the Transfer of Property Act and the absence of a provision corresponding to the second proviso in section 112 of the Transfer of Property Act. His contention is that the notice, Exhibit A-1, issued under section 111 (*h*) of the Act determining the tenancy must be held to have been waived and stood cancelled by reason of the landlord accepting rent which had become due in respect of the property since the expiration of the notice He urged that in the case of waiver of forfeiture by acceptance of rent which had become due since forfeiture, the Legislature had made a special provision in the second proviso to section 112 that when such rent is accepted after the institution of the suit to eject the lessee on the ground of forfeiture, such acceptance of rent is not a waiver and that the Legislature had made a deliberate departure and distinction between waiver of forfeiture and waiver of notice to quit In support of his contention learned Counsel relied upon the following observations of Buckland, J , in *Manicklal* v *Kadambini*[1] :

> " Now, under section 112 which deals with a similar position in connexion with forfeiture under section 111 (*g*) it is expressly provided that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture such acceptance is not a waiver.
>
> It is argued by analogy that in the circumstances there is no waiver. To that, I think, the answer is that where rent is accepted after the notice to quit, whether before or after a suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting One cannot logically say that the fact of accepting rent by itself shows an intention if a suit has been filed The intention shown by by the act itself must be the same in either case Therefore, by accepting the rent, the plaintiff in my opinion showed an intention to treat the lease as subsisting and acceptance of rent was waiver of the notice to quit notwithstanding the fact that a suit had already been filed for the purpose of ejecting the tenant. It has also to be observed that under section 112 the acceptance of rent after suit has been exactly provided for, and it may well be argued that had it been intended that acceptance of rent after suit should not operate as a waiver in the case of a notice to quit one would have expected that a proviso similar to that in section 112 would have been incorporated in section 113 "

With great respect, I am unable to agree with this view Further, this view has not been followed in several decisions of the various Courts Learned Counsel on both sides invited my attention to some of the decisions, both Indian and English ; learned Counsel for the appellant, relying upon some of the observations in the cases cited, attempted to make out that in the matter of waiver of forfeiture and waiver of notice to quit, there is some material difference between the law in England and the law in India and that the decisions in England cannot afford much of a guidance in the solution of the problem It is true that there are observations in some of the decisions suggesting some difference between the law in England and the law in India as enacted in sections 111 to 113 and 116 of the Transfer of Property Act. In my view there is no difference in the matter of substance and such difference as is observed in the statutory enactment of the law in India is very superficial and a distinction without difference On a careful consideration of all the aspects of the matter concerning the law relating to waiver of forfeiture and waiver of notice to quit, I am of the view that the law is the same in England and in India (*vide Chengiah* v *Rajah of Kalahasti*[2] and *Calcutta Credit Corporation Ltd* v *Happy Homes* (*Private*) *Ltd*[3].

Before I proceed further to examine the decisions, it is necessary to refer to the well-established principles, because, in my opinion, the principle underlying section

1 A I R. 1926 Cal 763

2 (1912) 24 M L J 263

3 (1968) 2 An.W R (S C) 42 (1968) 2 S C J 291 (1968) 2 M L J (S C) 42, 43

112, that after the landlord had elected to avail himself of the forfeiture and had given notice in writing to the lessee of his intention to determine the lease and followed it up by a suit in ejectment there is no waiver, would equally apply to section 113 where the landlord has instituted a suit in ejectment, preceded by the issue of notice determining the lease. The absence of a corresponding proviso, in section 113 is of no significance and does not manifest any intention on the part of the Legislature to make any difference When forfeiture occurs as specified in section 111 (*g*) on the happening of any one of the specified events, the lease does not *ipso facto* come to an end, but it only gives a right to the lessor, if he is so minded and so elects, to determine the lease, taking advantage of the forfeiture. It is not the mere happening of the specified events at the instance of the lessee that would bring about a termination of the lease putting an end to the relationship, but it is the determination of the lessor to elect to determine the lease that would bring about a dissolution of that relationship The requirement of the landlord to so elect is based upon the well-recognised principle of law that no man can take advantage of his own wrong and that the lessee by his unilateral act and by committing a wrong cannot make the lease void ; it is only voidable and has to be avoided by the lessor.

In striking contrast to this provision requiring a clear election on the part of the lessor to determine the lease, the provision in section 111 (*g*) states that the lease of immovable property is determined " on the expiration of a notice to determine the lease or to quit or of intention to quit duly given by one party to the other " Under section 111 (*h*) the lease is determined on the expiration of the notice which can be given by the unilateral choice of one of the parties, there being nothing further to be done by the other party. The issue of such a notice, of its own force and without anything more, after the expiry of the period, determines the lease.

Before the Amending Act of 1929, all that was necessary for the lessor was to manifest his election to avail himself of the forfeiture and determine the lease and it was enough if he did some act showing his intention to determine the lease following the forfeiture. There was a conflict of decisions as to whether a distinct, independent act showing the intention to determine the lease was a condition precedent to the suit in ejectment or whether a suit in ejectment itself could be regarded as showing the animus of the landlord. By the Amending Act of 1929 it is now provided that the lessor should give notice in writing to the lessee of his intention to determine the lease. The second proviso to section 112, that acceptance of rent after the filing of the suit in ejectment will not amount to a waiver, merely illustrates the principle that once the lessor with knowledge of the forfeiture makes an election by express words or by an unequivocal act, the election is irrevocable, with the result that, if the lessor gives notice determining the lease on the ground of forfeiture and files a suit, no subsequent act would amount to a waiver. In situations and circumstances, where the landlord has not filed a suit in ejectment, there may be some room or scope for argument that particular act done by the lessor in electing to determine the lease on the basis of forfeiture is either ineffective or equivocal and that the manifestation of the required intention is not clear, but, when the landlord manifests his intention by instituting a suit in ejectment that conduct is a final, positive and decisive act, and leaves no room for doubt, with the result that the election becomes irrevocable ; the lease is once for all determined, it cannot be retracted.

In this connection, reference may be made to the statement of the law by Woodfall on Landlord and Tenant (Twenty-sixth Edn , page 946, section 2057) :

> " If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, or distrain, or set up as a cause of forfeiture a subsequent non-payment of rent, it is no waiver. A writ containing an unequivocal claim for possession, or an unequivocal claim for a declaration of title to possession, operates as a final election to determine the lease."

Vide also 23 Halsbury, 672 (foot-notes (*a*) and (*b*)), where the distinction between demand for and receipt of rent after the cause of forfeiture prior to the suit and the receipt of rent after the suit in ejectment is referred to.

The leading decision in England is *Jones* v. *Carter*[1] in which it was held that, if a lessor brought an action in ejectment, that was an unequivocal act and that the receipt of rent after the action in ejectment could not operate to revive the lease ; the statement of the law by Lord Wensleydale in that case has been uniformly followed in all the subsequent cases. In *Grimwood* v. *Moss*[2], the question arose whether after the commencement of the action in ejectment the lessors were entitled to distrain for rent which subsequently accrued due. It was held that the action in ejectment was irrevocable and could not be retracted. Willes, J., after referring to *Jones* v. *Carter*[1], put the matter thus at page 364:

> " It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter . . . . In my opinion, the subsequent distress can make no difference "

I may next refer to the decision in *Evans* v *Enever*[3] in which the principle in *Grimwood* v. *Moss*[2] was applied. In that case the lease contained a proviso for re-entry if the lessee became bankrupt. In July, 1918 the lessee was adjudged bankrupt and in January, 1919 the lessor took out a specially indorsed writ claiming passession of the premises for forfeiture for non-payment of rent. Taking advantage of section 212 of the Common Law Procedure Act of 1852, the defendant paid the rent and costs to the plaintiff and the proceedings came to an end In the following May the plaintiff sued the defendant for possession claiming that the lease was forfeited by reason of the defendant's bankruptcy It was held that notwithstanding that the rent which was paid to the plaintiff in the first action had accrued due subsequent to the date of the adjudication, its acceptance by the plaintiffs did not operate as a waiver of the forfeiture. Lord Coleridge, J. observes as follows (at page 320) :

> " That is well-recognized law which has never been disputed But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position "

There is no need to refer to the other decisions and it is sufficient to refer to the decision in *Civil Service Co-operative Society* v. *Mogrigor's Trustee*[4] In that case, after the bankruptcy of the lessee, the lessors served on the debtors and the trustee in bankruptcy a notice of writ exercising the right of re-entry, and subsequently the lessors made a demand for and accepted the rent which had accrued due. It was held that the demand for and acceptance of rent accrued due after the issue of the writ did not operate as a waiver of the forfeiture Russel, J , (at page 357) referred to the cases and pointed out the distinction between the demand for an acceptance of rent simpliciter and the issue of and the commencement of a writ or legal proceeding in ejectment, the latter case constituting the final election of the landlord to determine the tenancy Reference may be made to the following observations (at page 358):

> " Neither of those cases touches the real question, namely, whether the issue and service of a writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture In my opinion, the authorities establish that this is so. In *Jones* v *Carter*[1] Parke B, held that after ejectment brought, there being no evidence of actual re-entry by the landlord, the landlord could not sue for rent ; and he cites with approval a decision of Lord Tenterden that the receipt of rent after ejectment brought for a forfeiture was no waiver of such forfeiture ; *Doe* v *Meux*[5] To the same effect is

1 (1846) 15 M & W 718
2 (1872) L R 7 C P 360
3 L R (1920) 2 K B 315
4 L R (1923) 2 Ch 347
5 (1824) 1 C & P 346

the case of *Grimwood* v *Moss*[1], where it is definitely stated that the bringing of an ejectment action is an irrevocable election to determine the tenancy ; See also *Rex* v. *Paulson*[2] · and *Evans* v *Enever*[3] I adopt the words of Lord Coleridge, J., in *Evans* v *Enever*[3], when he says. ' There is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position' "

In *Chengiah* v *Rajah of Kalahasti*[4], this Court followed and applied the rule enunciated in *Jones* v *Carter*[5] and *Grimwood* v *Moss*[1] It was held that where a right of forfeiture had accrued to the lessor and he had elected to determine the tenancy, the election was irrevocable and the parties could not by any subsequent agreement revive the old tenancy Wallis, C J , observed that the framers of the Transfer of Property Act did not intend to depart from the well-established rule of English Law that, where a right of forfeiture had accrued to the lessor and if he manifested his intention to enforce the forfeiture, that was an election to determine the tenancy and the election was irrevocable

Acceptance of rent which has become due since the forfeiture is regarded as waiver of forfeiture under the main operative portion of section 112, because the acceptance of rent is an affirmance that the lease was subsisting at the time when the rent became due after the forfeiture. But this acceptance of rent, after the suit in ejectment is filed, is not regarded as a waiver, because, once the matter has come to the Court, the election has become irrevocable The only thing necessary under the second proviso is that there must be an unequivocal demand for possession in a proceeding instituted in the Court.

Though it is not strictly necessary in the instant case, I may, however, observe that the principle of *Jones* v. *Carter*[5], that once an election has been made and the lease determined the election is irrevocable, would apply even when the election is not followed by a suit in ejectment and if the lessor had merely given a notice in writing of his intention to determine the lease as provided in section 111 (*g*). If rent is subsequently received by the lessor, the rights of the parties will have to be determined in accordance with the provisions of section 116 of the Transfer of Property Act The determination of the lease referred to in section 116 will certainly include the determination of the lease as a result of the lessor electing to take advantage of the forfeiture and determining the lease by giving notice in writing under section 111 (*g*). Once the lease is determined by the issue of the requisite notice, a contractual relationship thereafter can arise only with the consent of both the parties The irrevocable character of the election must follow in either case On juristic principles, I cannot see any difference between the determination of the lease under section 111 (*g*) as a result of the issue of the requisite notice after forfeiture and the determination of the lease under section 111 (*g*) Logically speaking the acceptance of rent referred to in the opening words of section 112 must be acceptance of rent before the lessor issues the notice in writing, determining the lease, under section 111 (*g*). As in the instant case a suit in ejectment has been instituted, it is unnecessary to pursue that aspect further

I shall next consider the scope of section 113, *i.e.*, the receipt of rent by the landlord accruing due subsequent to the notice determining the lease followed by a suit in ejectment. The plain language of section 113 indicates that a waiver does not *ipso facto* result from any act of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as subsisting It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. *Illustration* (*a*) must, therefore, be understood and applied in consonance with the principle underlying the section

1 (1872) L R 7 C P 360
2 L R (1921) 1 A C 271
3. L R. (1920) 2 K B 315.
4 (1912) 24 M.L J. 263
5. (1846) 15 M & W 718

with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances of the case, be regarded as amounting to a waiver. *Illustrations* are useful as aids to construction and for securing the proper meaning of the section, but they cannot control the plain meaning of the section ; See *Koylash Chunder Chose* v. *Sonatun Chung Barooie*[1]. *Illustrations* appended to sections of a statute are useful to show how sections may operate and are of relevance and value in construing the text. They should only be rejected as repugnant to the section asthe last resort of construction : *vide* Maxwell on Statutes page 43 . *Mohamed Syedol Ariffin* v. *Yeoh Ooi Gark*[2], and *Jumma Masjid* v *Kodimaniandra Deviah*[3] I do not see any repugnancy between the operative portion of section 113 and the *Illustration* (*a*) as there is no difficulty in understanding the *Illustration* in consonance with the section The context in which a particular act is referred to in section 113 shows that the rent should be received at such time and in such manner as to be equivalent to the landlord assenting to the lessee continuing in possession. The receipt of rent may only create a presumption and cannot by its own force amount to a waiver Section 113 consists of two limbs (*a*) the express or implied consent of the person to whom notice is given and (*b*) "the act of the person giving the notice showing the intention to treat the lease as subsisting." In order to constitute a waiver, both the limbs must concurrently operate, which means, that an act by itself and of its own force, without reference to the intention of the parties, cannot bring about a waiver So much is quite clear from the plain language of the section, which embodies the basic principles, and I find no justification for reading the *Illustrations* as being repugnant to the section Every effort should be made to interpret the *Illustration* in conformity with the main section The principle underlying section 116 of the Act will also apply in applying section 113 as this is also a case of continuance of the lease restoring the old tenancy. The English law regards the effect of waiver as creating a new tenancy, but the language of section 113 points to a restoration of the old tenancy. As observed earlier, this is really a distinction without difference because, in either case the essential point to be considered is whether the other party is continuing in the relationship of a lessee, either under the old lease restored, or under a new tenancy, subject to the same terms and conditions of the prior lease, as specified in section 116 It is in this connection that reference must be made to the following observations of the Supreme Court in *Karnani Industrial Bank* v *Province of Bengal*[4]

> " There can be no question of the lessee 'continuing in possession' until the lease has expired, and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made *at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession* "

I may also add that the marginal note " waiver of notice to quit " and the language employed in section 113 that " the notice is waived ", are not happy and that what really happens is virtually the creation of a new tenancy on the old terms and not a revival or restoration of the old tenancy. Viewed in this light, there is no diffrence between the Indian and English law The expression " waiver of notice to quit" has been used in the section rather loosely, taking the expression from some of the decisions in England I may refer to the following statement in Radman's Law of Landlord and Tenant (13th Edn , page 528, section 390) to show that the use of the expression " waiver of notice to quit " after the determination of the lease by such notice is not technically correct .

> " *Effect of withdrawal* —A notice to quit may be withdrawn or abandoned during its currency, or the right to enforce it may be waived, either expressly or by

1 (1881) I L R. 7 Cal. 132

2. L R (1916) 2 A C 575 at 581

3 (1962) 2 S C J 303 (1962) 2 M L J (S C) 90 : (1962) 2 An.W R (S.C) 90 A I R 1962 S.C 847 at 851.

4 (1951) S C J 407 : (1951) S.C R 560 : A.I.R 1951 S C 285

implication, before it has expired, but no withdrawal, abandonment , or waiver is effectual without the consent of the party to whom the notice is given.

It has been held that a withdrawal of the notice by consent during its currency does not nullify the notice, but operates as evidence of an agreement for a new tenancy to take effect on the determination of the old Where the notice has expired, *it is technically wrong to speak of a waiver though this convenient expression is commonly used* If the relationship of landlord and tenant continues thereafter *it is by agreement between the parties* constituting a new tenancy, *since the old tenancy is already at an end* "

An examination of the cases, which have dealt with the scope of section 113, read with *Illustration* (*a*) thereto, shows that the preponderance of the weight of authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease as subsisting According to the decisions, there should be either an express contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant. Whether the conduct of the party justified such an inference would undoubtedly turn upon the facts and circumstances of each case.

In this connection I may refer to the following observations of Lord Greene, M R. in *Bocker* v. *Palmer*[1]:

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible There is one golden rule which is of very general application, namely, *that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind*. It seems to me that this is a clear example of the application of that rule."

In the instant case it is impossible to attribute to the owner the intention either to continue the relationship of landlord and tenant or to create a new tenancy, The writ proceedings initiated by the tenant questioning the legality of the order of the Government, the hot contest made by the landlord therein and the landlord filing a suit immediately after the order of exemption passed by the Government completely repeal any notion of the relationship of landlord and tenant.

The circumstance that in the receipts issued by the owner, the word 'rent' is used is not decisive of the question.

In this connection, reference may be made to the latest decision of the Supreme Court in *Ramamurthy Subudhi* v. *Gopinath*[2]. That case dealt with the question whether the relationship between the parties was that of landlord and tenant or that of licensor and licencee. In that case the suit in ejectment, after the termination of the tenancy, was compromised, under which it was specifically provided that the tenant should vacate the house in question after a period of five years and that he should pay all arrears of rent claimed in the suit and also pay future rent promptly with a condition that, if the tenant committed default to pay rent for three consecutive months, the landlord would be entitled to obtain possession of the house. The question arose whether this compromise created a relationship of landlord and tenant so as to attract the provisions of the Orissa House Rent Control Act. In determining the intention of the parties, the Supreme Court pointed out that the fact that the owner had brought the suit in ejectment was an important circumstance in the view that when the landlord had brought the suit his intention was manifest that he was keen about ejecting the lessee after having terminated the tenancy, and it was difficult to impute thereafter an intention to the lessor to create a fresh tenancy. Commenting upon the use of the word 'rent' in the memorandum of compromise, the Supreme Court observed :

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1. (1942) 2 All E R. 674.
2 (1968) 2 S C.J 528 : A.I.R 1968 S C 919.

"Coming to the terms of the compromise, it is, true as stressed by the learned counsel for the respondent that the word 'rent' has been used, but the word 'rent' is not conclusive for, as observed by this Court in *State of Punjab* v. *British India Corporation Ltd* [1], in *its* wider sense rent means any *payment made for the use of land or buildings and thus includes the payment by a licensee in respect of* the use and occupation of any land or building In its narrower sense it *means payment made by tenant to landlord for property demised to him*".

The principle of this decision completely governs the instant case, both on the question of the effect of the suit in ejectment and the effect of the receipts passed using the word 'rent'.

I shall next refer to another recent decision of the Supreme Court in *Calcutta Credit Corporation Ltd* v. *Happy Homes*[2] In that decision, too, the Supreme Court pointed out that under section 113 of the Transfer of Property Act the act which operates as a waiver must show an intention to treat the lease as subsisting and the other party's consent, express or implied therefor. In that case the tenants, who were holding over, issued, on 12th August 1953, a notice to the landlord of their intention to vacate the premises on 31st August, 1953. But by their letter, dated 26th August they withdraw that notice. The landlord did not agree to the withdrawal of the notice and insisted that the lease had been determined under section 111 (*h*) of the Transfer of Property Act. Dealing with the question of waiver, the Supreme Court observed as follows :

"Clearly section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent....express or implied therefor. The law under the Transfer of Property Act on the question in hand is not different from the law in England. Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting"

Reference may also be made to the decision in *Clarke* v *Grant*[3], in which after valid notice to terminate the lease the agent of the landlord accepted the rent in the mistaken belief that it was for a period prior to the notice, determining the lease. It was held that it did not amount to waiver It is true that the mistake on the part of the agent when he received the rent is an important distinguishing feature, of that case but what is relevant is the prospective of approach of Lord Goddard, C.J., as to the consequence of the receipt of rent The distinction between the receipt of rent in the case of a forfeiture before determining the lease and the receipt of rent after the determination of the lease was pointed out in these terms :

"If one may say so with respect to the learned Deputy Judge, he fell into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that an act of forfeiture has been committed. If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognises that the lease is continuing *With regard to the payment of rent after a notice to quit, however that result has never followed.* If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a terms which has expired. *Therefore, the tenancy having been brought to an end by a notice to*

1. (1964) 1 S C J 571 (1964) S C R 114 at 123 : A I R 1963 S C 1459 at 1463
2. (1968) 2 AnWR (S.C) 42 (1968) 2 S C J 291 (1968) 2 M L J (S C) 42
3. (1949) 1 All E R. 768

quit, a payment of rent after the termination of the tenancy *would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy.*

That has been the law ever since it was laid down by the Court of King's Bench in *Doe d Cheny* v *Batten*[1] where Lord Mansfield said .

"The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was ?"

It is impossible to say that the parties in this case intended that there should be a new tenancy The landlord always desired to get possession of the premises. That is why he gave his notice to quit The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy "

In the instant case there can be no doubt, that *quo animo* when the rent was received during the pendency of the suit was not to have the relationship of landlord and tenant.

I may next refer to the Bench decision of the Bombay High Court in *Navnitlal* v. *Baburao*[2] In that case, the Rent Court released the house for the personal use of the landlord and he filed a suit in ejectment after serving upon the tenant the requisite notice to quit. The tenant sent a cheque expressly stating as rent but the landlord in the receipt, noted that he received it as compensation for use and occupation. On behalf of the tenant emphasis was laid on the absence of a proviso in section 113 of the Transfer of Property Act corresponding to the second proviso to section 112. But this argument was not accepted and the Bench held that the test in all these cases is the intention at the time when the payment is received, *i e*, was the act of the landlord one from which one can impute the intention of creating a renewal of tenancy Stone, C J, pointed out that in the case of acceptance of rent subsequent to the notice to quit by the landlord is inaccurately referred to as the waiver of a notice to quit but that the correct view is that it is the creation of a new agreement. The decision of Buckland, J, in *Manicklal* v. *Kadambini*[3] was referred to but not followed. Kania, J, (as he then was) who delivered a concurring judgment and observed that in the matter of effect of acceptance of rent after notice to quit there was no difference between the Indian Law *i e*, the provision in section 113 of the Transfer of Property Act, and the English law The learned Judge also rejected the argument that by reason of the absence of a proviso in section 113, the Legislature should be deemed to have made a departure from section 112; it was also pointed out that the phraseology of section 113 is not strictly accurate That receipt of rent cannot be separated and divorced from the intention to treat the lease as subsisting was pointed out in these terms :

"In my opinion, this line of argument is faulty, because it attempt to split the provision of section 113 in two parts It is an attempt to read in section 113 the words 'by acceptance of rent' as an act resulting absolutely in the waiver of the notice to quit, irrespective of the question whether there was an intention to treat the lease as subsisting or not "

I may also add that the relevant discussion in this Bench decision of the Bombay High Court, attention is focussed mainly on the question of the effect of receipt and not on the note made by the landlord that the receipt of the money was as compensation Even the recital, whether as rent or "as compensation," is not decisive in view of the decision of the Supreme Court in *Ramamurthy Subudhi* v *Gopinath*[4], referred to earlier

Reference must next be made to the decision in *Kamlapat Sahai* v *Mt. Manho Bibi*[5] In this case the landlord instituted a suit in ejectment and obtained a decree. The question arose whether payment of rent in pursuance of an arrangement in the

1. (1775) 1 Cowp 245
2. A I.R. 1945 Bom 132
3. A I R. 1926 Cal. 763.
4 (1968) 2 S C J 528 : A I R 1968 S C 919.
5. A.I.R. 1948 Oudh 127.

appellate Court in the matter of stay of execution amounted to waiver when payments were received as rent The decision in *Manicklal Dey* v *Kadambini Dassi*[1] was referred to and dissented Kidwai, J., delivering the judgment observed that once the suit has been instituted it cannot possibly be said that the lessor had manifested the intention that the lease was subsisting It was observed that the word "rent" was misused in the receipt and would not indicate that notice to quit had been waived The importance of this decision is that when a landlord and the tenant have been engaged in a serious fight in Court proceedings asserting rival contentions, it was impossible in that background to impute to the less or an intention to treat the lease as subsisting The principle of this decision directly applies to the instant case

In *Ilahibux* v *Munni Khan*[2] in which the facts were similar, the same view was taken observing that the test was, if the tenant had insisted upon withdrawal of the suit in ejectment treating the relationship of landlord and tenant as subsisting, would the landlord have agreed It was observed that the act of the landlord ought in the light of the circumstances in the case lead to the irresistible conclusion that he had given up the rights asserted by him in the proceedings and that when parties are litigating their rights in Court those rights could not be affected except by an express contract between them to the effect that the rights asserted in the suit by the plaintiff and denied by the defendant had been adjusted either out of Court or through the intervention of the Court

I may now refer to the decision of the Calcutta High Court in *Mahadeo Prasad* v. *Sulekha Sarkar*[3] in which the view of Buckland, J was not followed In that case the landlord after a valid notice to quit brought a suit and obtained a decree in ejectment, the tenant's claim for protection under the Rent Control Law having been negatived During the pendency of the appeal by the tenant, the landlord accepted rent from the tenant who desired to be relieved from the bother of depositing the rent under the procedure provided in the Rent Control Act It was held that under the circumstances, payment and acceptance of rent was not with the intention of renewing or reviving or continuing the old tenancy or creating a new one It was also held that independently of the representation of the tenant that he made the payment to the landlord merely as a matter of convenience the legal position was the same and there was no waiver as there was not the requisite *consensus ad idem* to treat the lease as subsisting With regard *Illustration* (*a*) to section 113, it was pointed out that it is only in the absence of any indication pointing reasonably to a contrary intention that the acceptance of rent would amount to a waiver In this decision the decision of Buckland, J, in *Manicklal Dey* v *Kadambini Dassi*[1] was not only referred to but the criticism of Stone, C J, in *Navnitlal* v *Baburao*[4] was also referred to with approval This decision clearly emphasises that the fundamental principle in the doctrine of waiver is the intention of relinquishment of a known right, and that an act by itself would not amount to waiver. This decision was followed and approved in a Bench decision reported in the same volume in *Panchannan* v *Haridas*[5] in which also the decision of Buckland, J in *Manicklal Dey* v *Kadambini Dassi*[1] was referred to and dissented In that case, after notice to quit, the payment of rent was made and received The tenant made the payment in pursuance of the Rent Control Act and the landlord received it The Bench pointed out that mere acceptance of rent was not decisive but the intention was the important factor and the circumstance that it was paid under the provisions of the Rent Control Act, leaving no option to the landlord repelled any intention on his part, to treat the lease as subsisting The point to be noticed in this decision and other decisions where payments were made and received under the Rent Control Act is that those decisions emphasise that the governing factor is the intention and not mere receipt, divorced from the other circumstances of the case The Bench pointed out that it is for the tenant to establish that there was an intention to treat

1 A.I R 1926 Cal. 763
2. A I R 1953 Nag 219
3 A I.R 1954 Cal. 404
4 A I R 1945 Bom 132
5 A I.R 1954 Cal 460

the lease as subsisting and that the circumstance under which the rent was paid and received was the important consideration and not the mere payment.

In *Pullin Behari* v *Miss Lila Dey*[1] the same view was taken and the decision in *Mahadee Prasad* v *Sulekha Sarkar*[2] was approved and followed. While referring to this decision, I may add that there are observations in that judgment that there is some difference between the English Law and the Indian Law in view of the language employed in section 113 of the Transfer of Property Act, which I have already indicated is not quite happy That apart the recent decisions of the Supreme Court in *Ramamurty Subudhi* v *Gopinath*[3] and *Calcutta Credit Corporation Ltd* v *Happy Homes*[4] have made it clear that the section 113 of the Transfer of Property Act there is really no difference between Indian and English Law.

In *Moti Lal* v. *Basant Lal*[5] it was held that no question of waiver arises after the landlord has brought a suit after issuing a valid notice determining the lease. It was observed as follows :—

> "As will appear from the language of section 113, a waiver can be brought about by the action of the landlord if after determining the tenancy by notice the landlord chooses to accept the rent again from the tenant. In such an event under section 113 of the Transfer of Property Act, a notice for determination of the lease already given by the landlord to the tenant will be deemed to have been waived No question of waiver arises after the landlord has brought a suit on the basis of a valid notice given for determination of the lease. After such a suit has been brought, there can be no waiver, though it is always open to a landlord to renew the lease at any time he pleases. I do not therefore think that any question of waiver arises in this case."

In *Harbhajan Singh* v. *Munshi Ram*[6] the same view was taken emphasising that the question of waiver is one of intention and that mere acceptance of rent after the expiration of the notice to quit is not in itself a waiver but that it is merely a circumstance which will have to be considered along with other facts of the case bearing upon the question of intention of the lessor. The circumstances relied upon in that case repelling any inference of waiver was, the Court proceedings instituted by the landlord to recover possession.

The Patna High Court also has taken the same view in *Zaffar Hussain* v. *Mahabir Prasad*[7] that acceptance of rent by the landlord after the issue of notice to quit by itself would not constitute waiver and that there must be evidence of *consensus ad idem* between the parties to continue their relationship as creating a new tenancy. The view taken by the earlier Bench decision of the same High Court in *Walli Ahmed* v. *Mt. Hussaini*[8] was followed In *Zaffar Hussain* v. *Mahabir Prasad*[7], the notice to quit was given on 11th January, 1954 and application for eviction was filed in June, 1954, the complaint of the landlord being that the tenant defaulted to pay rent from November, 1953 to May, 1954, and the question was whether the claim for rent for the period subsequent to the termination of the lease by notice to quit amounted to waiver. The Bench held that it must be shown by independent evidence that the landlord has attempted to continue the relationship of landlord and tenant and that in the absence of such evidence, a mere claim for rent would not be sufficient In the earlier case in *Walli Ahmed* v *Mt Hussaini*[8], the Bench had held that the institution of a suit in ejectment is an unequivocal declaration of an intention to determine the tenancy and the inclusion of a claim for rent in such a suit should not be held to be a waiver, but the claim for rent must be understood as a claim for damages for wrongful occupation. In *Puran Mal* v. *Onkar Nath*[9], notice in quit was given by the landlord on 1st June, 1946, and a suit in ejectment was filed in November,

1. A I R 1957 Cal 627
2. A I R 1954 Cal 404
3. (1968) 2 S C J 528 A I R 1968 S C 919.
4. (1968) 2 M L J (S C) 42 · (1968) 2 An W.R (S C) 42 . (1968) 2 S C J 291.
5. A I R 1956 All 175
6. A I R. 1956 Punj 246
7. A I R 1957 Pat 206
8. A I R 1917 Pat 469
9. A I R. 1959 Pat. 128.

1946, in which there was also a claim for arrears of rent from February, 1946, upto the date of suit and future profits. A second suit for the same relief was filed in December, 1949, claiming arrears of rent from December, 1946 to November, 1949. Both the suits in which there was a denial of title were decreed. In the High Court, the plaintiff was permitted to amend the plaint deleting the claim for rent On behalf of the tenant, an argument was advanced that, notwithstanding the deletion of the prayer for recovery of rent, the landlord must be deemed to have waived in view of his having previously claimed rent in both the suits for the period subsequent to the notice to quit. The Bench held that the question of waiver was essentially a question of intention and the action of the landlord should mainfest an intention to keep the lease still subsisting. The matter was stated thus :

> "Further, as will appear from the above, the question whether or not there was waiver of notice to quit is purely a question of intention of the parties. It is quite manifest from the provisions of section 113 that in order to constitute waiver there must be an intention not only on the part of the lessor but also on the lessee to treat the lease as subsisting In order, therefore, to determine whether or not in a particular case there was waiver of notice to quit one has to see whether from the contract of the landlord and tenant, by demand and acceptance of rent or by demand followed by express promise to pay, or otherwise an intention to treat the lease as subsisting can be inferred, and this would certainly depend upon the facts and circumstances of each case
>
> When it is a question of intention it is plain that not even the payment and acceptance of rent by the landlord after the notice to quit, much less a mere demand of rent, necessarily waives the notice. The question under section 113 is whether the act of landlord, manifested either by acceptance of rent or by demand of rent, is such as necessarly leads to the inference that there was an intention of creating a renewal of the tenancy or as treating the tenancy as still subsisting. Therefore, neither the acceptance of rent nor the demand of rent is conclusive on the question of waiver. It is a question of fact to be determined in each case."

I may next refer to the decision of the Single Judge in *Ram Dayal* v. *Jawala Prasad*[1], where during the pendency of the suit in ejectment, the landlord received rent from the tenant and the learned Judge referred to and followed the decision of Buckland, J., in *Manicklal Dey* v. *Kadambini Dassi*[2], taking the view that the mere act of receiving the rent was sufficient to constitute waiver though such a receipt was made during the pendency of the suit. There is no reference to any other decision and discussion. With respect, I am of the view that this decision is not of much assistance as a precedent.

Learned Counsel for the appellant relied upon the Bench decision in *Kapur Chand* v. *Kanji*[3], of the Andhra Pradesh High Court where the landlord has received rent from the tenant after notice to quit. There, before the matter came to the High Court, there was a remand earlier and on remand the lower appellate Court had found on the evidence that the landlord accepted the rent for several months after the notice to quit with the intention of treating the lease as subsisting On this finding, if I may say so, it was rightly held that the landlord, cannot eject the tenant. The decision in *Kai Khushroo* v. *Bai Jerbai*[4], turned upon the peculiar facts of that case and there was a difference of opinion, Patanjali Sastri, J., as he then was, taking a different view There, after notice to quit, defendants 2 and 3 who claimed to be sub-tenants insisted upon continuing in possession and paid the rent month after month The majority took the view that the landlord had obvious motive in receiving the payments of rent after a particular period *i e*, the appointment of a receiver of the property of the mortgagor at the instance of his mortgagee. Having regard to the uniform view taken in all the decisions, both Indian and

1 A I R 1966 All 623

2 A I R 1926 Cal 763

3 (1959) 1 An W R 143 A I R 1959 Andh 346

4 (1949) F C R 262 . (1949) F L J. 168 : A I R 1949 F.C 124

English, I am not inclined to interpret this decision of the Federal Court as an authority for the position that the payments and receipt of rent as such in every circumstance would amount to waiver, whatever may be the circumstances of the case and the intention of the lessor It is significant to refer to the following observations to show the crucial distinguishing feature in that case.

"There was obviously a change when the second set of cheques were sent to the plaintiff in November, 1942 This time they were not returned to the defendants and the plaintiff kept them in his hands for some time and then sent them on to his bankers Curiously enough this synchronizes with the appointment of a Receiver by the mortgagees who was to take possession of the house on 20th November, 1942 It may be that it was this circumstance which brought about a change in the mind of the plaintiff"

That the Supreme Court regarded the intention of the parties as important is clear from the decision in *Karnani Industries Bank* v *Province of Bengal*[1], already referred to, in which the Supreme Court has adverted to the significance of the context in which the payment was made and received In the decision of the Federal Court emphasis was laid that when the tenant made the payment, he used the word 'rent' in the letter which accompanied the cheque In the latest decision of the Supreme Court already referred to in *Ramamurty Subudhi* v *Gopinath*[2], the Supreme Court had observed that the use of the word 'rent' was not conclusive. For all these reasons I am of the view that the decision of the Federal Court in *Kapadia's case*[3] must be restricted to the facts of that case and not laying down a general proposition contrary to the plain language in section 113 of the Transfer of Property Act in which the intention to treat the lease as subsisting is clearly emphasised. I may also add that in *Abdul Jameel* v *M/s Simson and Machonochy Ltd*[4] I have held that if a contractual tenancy comes to an end by efflux of time and if the tenant continues in possession and the landlord accepts the rent after such expiration that will not afford ground for holding that the landlord has assented to a new contractual tenancy. The observations of the Supreme Court in *Ganga Dutt* v *Kartika Chanda Das*[5], as extracted in the above decision would show that the Supreme Court was already of the view that after the determination of the tenancy, possession of the tenant must be in pursuance of any contract, express or implied, thereby emphasising that the paramount consideration is the intention of the parties concerned and not any physical act of omission or commission

The result is the second appeal is dismissed with costs. No leave.

S.V.J. *Appeal dismissed.*

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1. (1951) S C J 407 (1951) S C R 560 A I R 1951 S C 285
2. (1968) 2 S C J. 528 A I R 1968 S C. 919
3. (1949) F L J 168 (1949) F.C.R 262
4. (1967) 1 M L J 337
5. (1961) 3 S C R 813 (1962) 2 M L.J. (S C) 161 (1962) 2 An W R (S C.) 161 : (1962) 2 S C J 584 A I R 1961 S C. 1067 at 1070.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT —MR M ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M NATESAN

A. Mohambaram . *Appellant**

v.

M. A Jayavelu, Advocate, residing at Thenramani Street, Vellore, N.A District and others *Respondents*

Criminal Procedure Code (V of 1898), section 492 and Criminal Rules of Practice, Rule 45—Constitution of India, Articles 227 (2) and 309 proviso—Appointment of Public Prosecutor—Procedure—Whether rule 45 directory or mandatory—Failure to comply—Effect of—Appointee not a nominee of Collector—Validity of such appointment.

Constitution of India (1950), Article 226—Writ of quo warranto—*When can be sustained—Office of Public Prosecutor, whether public office——Administrative—Interference by Court.*

Constitution of India (1950), Articles 14 and 16—Employment or appointment to office under State—Taking into account extraneous considerations—Whether violative.

Words and Phrases—'Nominate'.

Per Anantanarayanan, C J—Not merely is the office of Public Prosecutor a public office but it is a public office of considerable significance, for the integrity and efficiency of the administration of Criminal Justice Any one appointed to this office must, in the interests of the public, have a high degree of efficiency, and knowledge of the law of Crimes and the Criminal Procedure; he must have character and integrity, that are irreprochable, and above suspicion , he must have a sense of his duty to the public and to the Court, as over-riding considerations It is in the interests of the State and the Public, that any selection to such an office, must be based on the most pertinent considerations, without prejudice or favour, and that only the best person or persons should be appointed

Unless and until rule 45 of the Criminal Rules of Practice is changed, in accordance with the due procedure, it is a law-based rule, which Government must adhere to It cannot be set at naught, or flouted, in an individual cases merely because of caprice, or in an arbitrary manner If that happens the Court, are bound to interfere, though it may be open to Government to modify or alter the ule, for future contingencies

Not merely are the Executive Authorities, that is, the State in its Executive aspect, bound to conform to the rule of law, but such a requirement is even more obligatory on the State, than on any private citizen Any such decision should be predictable, and in conformity with principle, it should both appear to conform, and, also in the spirit as well as the letter, should subserve the rule of law Arbitrariness in any such sphere, if countenanced or tolerated, will gravely jeopardise the rule of law, and may even bring it to an end

Per Natesan, J—To sustain a *quo warranto* writ, the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority that is in appointing him the Government has contravened statutory provisions or binding rules (That the office of Public Prosecutor is a public office was not questioned)

Indubitably the office of Public Prosecutor involves duties of public nature and of vital interest to the public Manifestly, the public would, in a large measure be interested in the manner in which he discharges his duties, and he could be properly considered, to be a person employed in connection with the affairs of the State.

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* W.A. Nos 179 and 190 of 1968. 6th December 1968.

The procedure relating to the appointment of Public Prosecutor can be said to relate to practice and proceedings of the Court The power to frame rules for regulating the practice and proceedings of criminal Courts can properly include the qualifications of the person who has to function as Public Prosecutor in Criminal Courts. Rule 45 cannot be considered inconsistent with the provision of section 492 Criminal Procedure Code, vesting the power of appointment of Public Prosecutor on the State Government. The rule does not, in the least, detract from the power of Government to appoint Public Prosecutor It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule, the power to appoint Public Prosecutor still vests in the State Government, and so the requirement of Article 227, for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force, is fully satisfied (*Held*, this rule could be sustained also under the Proviso to Article 309 of the Constitution)

Having regard to the history of the rule regarding the appointment of Public Prosecutor, it was held that the rule has been made under constitutional powers and so has statutory force, whether it is Article 227 or the Proviso to Article 309 that is relied upon The appointment of Public Prosecutors for the Districts does not rest solely on Standing Orders of the Government

The appointment by Government of a Public Prosecutor for the District is conditioned by two requisites. Firstly the Collector should consult the Sessions Judge. Secondly after such consultation, the Collector should submit his nomination to the Government. This does not mean that the Government is bound to accept the nomination sent up by the Collector It is not the rquirement of the rule that there can be only one nomination, and, once a nomination is sent up, it must be accepted by the Government To interpret the rule in that manner would be to make the Collector the appointing authority,—and that he is not—under section 492 Criminal Procedure Code And such an interpretation would make the rule *ultra vires*, whether it is a rule under Article 227 or Article 309 The Government is the appointing authority and it is the Government that has to take the final decision It may not approve of a nomination sent by the Collector It may require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. Only, for appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post The object of the requirements of the rule is self-evident The subject-matter is such that the requirements of the rule cannot be considered to be empty formalities They are intended to secure to the Government, the appointing authority, real assistance (On facts *held*, rule 45 has been violated).

Rules made under statutory powers, unless they are constitutionally invalid, must be adhered to Statutory Rules which are functional in character are not made to be violated at the caprice of the Executive Auhoirty concerned There is no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law (*Held*, true the appointment is an administrative act; but if it contravenes the law, Courts can intervene even with an act of the Executive Authority Here no absolute discretion is vested in the Government for making the appointment The appointment has to be made in accordance with a rule, and a procedure prescribed has to precede the appointment)

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion. When considerations extraneous to the suitability of a person for appointment are taken into account in making an appointment, there is an abuse of discretionary power and so the exercise of power exceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds It could then well be said that Article 16 which provides that there

shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and Article 14 are violated While the fitness of a person to an office may be solely within the discretion of the appointing authority, the discretion must be exercised *bona fide* Arbitrary discarding of existing rules, be they administrative, and improvising *ad hoc* procedure for particular cases, is dangerously unhealthy trend, as it may descend to " *ad hominum* " procedure and give room for comments of favoured treatment violative of Article 16 While Courts will not interfere with the choice of an individual with reference to an appointment made in the due exercise of its discretion by the Government without shutting out of consideration the claims of others for the post, Courts will certainly stand guard and are bound to do so, in a democracy, against flagrant abuse of powers on the simple and sound principle that the Constitution ' cannot have intended powers to be abused beyond what might be called the inevitable area where opinions may legitimately differ '

To nominate, means, to name or designate by name for office or place. A meaning for the word " nominate " is ' to propose for office '.

Appeals under clause 15 of the Letters Patent against the Order of the Honourable Mr Justice Kailasam dated 28th March, 1968, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 436 and 437 of 1968, presented under Article 226 of the Constitution of India to (*i*) issue a writ of *quo warranto* directing the first respondent requiring him to show cause by what authority he claims to have usurp, enjoy and perform the rights, duties, privileges of the office of the public prosecutor, North Arcot at Vellore, and (*ii*) to issue a writ of *mandamus* directing the 2nd respondent abovenamed to act upon the only nomination of the Collector of North Arcot District for the post of public prosecutor, North Arcot and to appoint the petitioner therein as the Public Prosecutor, North Arcot District, ignoring its order G O. Ms. No 231 (Home Department), dated 30th January, 1968.

V. Thiyagarajan, for Appellant.

T Govindarajulu and *P.M Sundaram*, for 1st Respondent

The Government Pleader, for 2nd Respondent.

The Court delivered the following Judgments

Anantanarayanan, C.J —I have had the advantage of perusing the judgment of my learned brother, which discusses all relevant aspects of these Writ Appeals, in considerable detail. I am in entire agreement with his conclusions, and, if I am appending a brief, separate judgment, it is only because of the importance of the vital aspect.

The facts of the record themselves are incontrovertibly established, and, indeed, there are no two views permissible on the facts. Briefly stated, in making the appointment of the first respondent to the office of the Public Prosecutor, North Arcot Sessions Division, the State was not appointing a person who had been nominated by the Collector, or was any nominee of the Collector, under rule 45 of the Criminal Rules of Practice. The view to the contrary, taken by the learned Judge (Kailasam, J) is clearly based on a misconception of the actual facts of the record, as my learned brother has so plainly shown

On this aspect, which is the factual aspect, it is sufficient to be very brief As the rule makes it mandatory for the Collector to consult the Sessions Judge, what actually happened was that the Collector referred the names of 17 Advocates, furnished by the Bar Association, to the District and Sessions Judge, to enable him to propose names, separately, for the office of Public Prosecutor and the office of Government Pleader, as the Collector had justification to assume that separate incumbents would have to be appointed for the two offices. The District and Sessions Judge furnished two distinct panels of names, and the appointee-respondent was included in the panel of names for the office of the Government Pleader , which does not now concern us at all. It is not in dispute that the name of the appellant was included

by District and Sessions Judge in the panel of names for the office of Public Prosecutor The Collector forwarded his nomination to Government, in compliance with rule 45, making the specific recommendation or nomination, whichever it might be termed, that the appellant, who was then Additional Public Prosecutor, be appointed Public Prosecutor, North Arcot Sessions Court The appointee-respondent was not nominated by the Collector for this office, in any sense If the nomination of the Collector had been accepted by Government, the appointment of the appellant to that office would necessarily have created a vacancy in the office of Additional Public Prosecutor, a distinct office, the filling up of which was not then imminent. The Collector expressed his opinion that that office could be given to the respondent-appointee, so that he could pick up work, and equip himself for greater responsibilities As my learned brother has shown, the actual appointing authority under section 492 of the Code of Criminal Procedure is the State Government, and rule 45 of the Criminal Rules of Practice is only the mode by which this power is to be exercised The Collector is not the appointing authority, and, hence, the Government could well require the Collector not merely to nominate one person, but to submit a panel of nominees. Further, where the Government are unable, for any proper reason, to accept a single nomination of the Collector, if it happened to be a single nomination, as in this case, the Government would further correspond with the Collector, with a view to obtaining a nomination, which might seem to be acceptable, in public interest If the rule were to be taken as implying that the Collector need make only one nomination, even if Government were unable to accept that nomination this would imply that the virtual crux of the power would be with the Collector, and not the State Government, which is not the intendment of section 492 of the Code of Criminal Procedure.

Hence, in the context of these facts, I propose to deal, very briefly, with the following questions :

1 Is the office of Public Prosecutor, a public office, within the ambit of *quo warranto* jurisdiction ?

2 Is rule 45 of the Criminal Rules of Practice not merely an administrative rule of directory significance, but a statutory or law-based mandatory rule, which the State Government must conform to, until and unless the content of the rule be changed ?

3 Is the State Government bound to conform to the rule and prescribed procedure, in making such an appointment to a public office, as part of the incidents of the rule of law ?

It appears to me, very clearly, that the answers to all these questions must be in the affirmative Not merely is the office of Public Prosecutor a public office but, in my view, it is a public office of considerable significance, for the integrity and efficiency of the administration of criminal justice Any one appointed to this office must, in the interests of the public, have a high degree of efficiency, and knowledge of the law of Crimes and the Criminal Procedure ; he must have character and integrity, that are irreprochable, and above suspicion , he must have a sense of his duty to the public and to the Court, as overriding considerations. As can be immediately realised, if these requisites are lacking, the incumbent to such an office can gravely injure the administration of criminal justice The ideal Public Prosecutor is not surely concerned with securing convictions, or with satisfying the departments of the State Government, with which he has to be in contact. He must consider himself as an agent of Justice, and, as my learned brother has pointed out, his discretion to apply to the Court for its consent to withdraw from any prosecution, is a vital one It is in the interests of the State and the Public, that any selection to such an office must be based on the most pertinent considerations, without prejudice or favour, and that only the best person or persons should be appointed

I propose to deal very briefly with the second question, namely, the binding character, of rule 45 of the Criminal Rules of Practice My learned brother has traced the lineage of this rule, and I need not recapitulate that aspect. But I do

not see how it could be seriously disputed, that the preamble to the Rules, published in 1958, is conclusive that Article 227 of the Constitution of India is the foundation for this rule, particularly, Article 227 (2) (*b*), which invests the High Court with power to make and issue rules "for regulating the practice and proceedings of such Courts". It must be noticed that the Government promulgated the Rule, after the High Court had framed it and after Government had accorded their prior sanction. As my learned brother has stressed, the relevant part of the Proviso to Article 309 of the Constitution could, equally, be regarded as the foundation of the Rule No doubt, the rule can be changed, if, in practice, there are difficulties experienced in the working of the rule. But, unless and until the rule is changed, in accordance with due procedure, it is a law-based rule, which Government must adhere to It cannot be set at naught, or flouted, in an individual case, merely because of caprice, or in an arbitrary manner If that happens, the Courts are bound to interfere, though it may be open to Government to modify or alter the rule, for future contingencies.

This brings me to the last aspect of the matter, namely, whether it is open to the State Government to claim that, since it is the appointing authority with the power to appoint a person to the concerned office, and the Collector is a subordinate of Government, the Government may appoint whoever they like, irrespective of the procedure laid down by rule 45, or the nomination of the Collector, because the power is unfettered. It is here that the observations of their Lordships of the Supreme Court in *Jaisinghani* v. *Union of India*[1], which were also relied on by the Kerala High Court in *K M Joseph* v. *State*[2], appear to be not merely pertinent, but to bear upon a situation of that kind, with the weight and solemnity of basic legal principle. Not merely are the Executive Authorities, that is, the State in its executive aspect, bound to conform to the rule of law, but such a requirement is even more obligatory on the State, than on any private citizen. Any such decision should be predictable, and in conformity with principle ; it should both appear to conform, and, also in the spirit as well as the letter, should subserve the rule of law. Arbitrariness in any such sphere, if countenanced or tolerated, will gravely jeopardise the rule of law, and may even bring it to an end.

For the reasons set forth by my learned brother, I entirely agree that the order appointing the first respondent as the Public Prosecutor of North Arcot District must be set aside, and that the State Government should now take up the question for consideration and due action, in the light of principles that we have stated. The appellant may claim that he has every right to be considered for the post, but he has certainly no right now, to the appointment *per se* ; the due appointment must be made afresh by Government, in conformity with the procedure established by law.

Natesan, J.—The appellant in these appeals is an Advocate of the Madras High Court practising at Vellore, North Arcot District, and an aspirant for the post of Public Prosecutor, North Arcot Sessions Division, which fell vacant on 31st August, 1967. By G O. Ms No. 231, dated 30th January, 1968 the Government appointed the first respondent herein as the Public Prosecutor and the appellant challenging the legality of the appointment moved this Court under Article 226 of the Constitution by two petitions, one for a writ of *quo warranto* directed against the first respondent requiring him to show cause, by what authority he claims to hold the office of Public Prosecutor, North Arcot, and another for a writ of *mandamus* requiring the State of Madras, the 2nd respondent herein, to appoint the appellant as Public Prosecutor. The substantial ground of challenge to the appointment and the basis of the appellant's claim for the post is, that statutorily the appointment by Government can only be on the nomination of the District Collector in consultation with the Sessions Judge of the Division and that the Collector nominated the appellant only for the post Our learned brother, Kailasam, J., before whom the petition came up for hearing, while holding that the appointment to the post of Public

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1. (1967) 1 I T J 903 : (1967) 2 S.C.J. 102; A.I.R. 1967 S C. 1427 at 1434.

2. A.I.R. 1968 Ker 244.

Prosecutor is governed by statutory requirements, proceeded in the view that the requirements of the rule have been complied with and dismissed the applications

The function of a writ of *quo warranto* under the Constitution is summed up by Gajendragadkar, J., (as he then was) as follows in *University of Mysore* v *Govinda Rao*[1] :

"Broadly stated, the *quo warranto* proceeding affords a judicial inquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty , if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of *quo warranto* ousts him from that office In other words, the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions , it also protects a citizen from being deprived of public office to which he may have a right "

To sustain a *quo warranto* writ, the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority, that is, in appointing him the Government has contravened statutory provisions or binding rules That the office of Public Prosecutor is a public office, is not questioned before us for the respondents Section 4 (*t*) of the Code of Criminal Procedure (V of 1898) defines "Public Prosecutor" thus .—

"'Public Prosecutor' means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Government in any High Court in the exercise of its original criminal jurisdiction."

Section 492 of the Criminal Procedure Code providing for the appointment of Public Prosecutor by the Government is found in Part IX, Supplementary Provisions, Chapter XXVIII, under the heading "Of the Public Prosecutor" and runs thus :—

"(1) The State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of Police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case "

The procedure as to appointment is rule 45 of the Criminal Rules of Practice which reads :—

"A Public Prosecutor may be appointed for each Sessions Division The appointment may be made for a period of three years on the nomination of the Collector who shall consult the Sessions Judge before submitting his nomination to Government but the Government is not precluded from reconsidering the appointment, if it thinks fit, before the close of that period "

Indubitably the office of Public Prosecutor involves duties of public nature and of vital interest to the public Under section 417, Criminal Procedure Code, the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Under section 493, Criminal Procedure Code, the Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any

1. (1964) 4 S.C.R 575 : A.I R. 1965 S C. 491 at 494.

such case, the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act under his directions The Public Prosecutor may appear to conduct a prosecution only under instructions from the Collector, and other officers who require his assistance in the conduct of criminal cases, should communicate with the Collector He is the person to whom notice of appeal shall be given by Courts of Session under section 422 of the Code The Public Prosecutor is not just an Advocate engaged by the State to conduct its prosecutions. The importance of the office from the point of view of the State and the community, is brought out in section 494, Criminal Procedure Code, which vests in the Public Prosecutor a discretion to apply to the Court for its consent to withdraw from the prosecution of any person The consent, if granted, has to be followed up by the discharge of the person or his acquittal, as the case may be It is relevant in this context to cite the following observations of the Supreme Court in *State of Bihar* v *Ram Naresh*[1] about the position of Public Prosecutor :—

> " In this context it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in *Faqir Singh* v *Emperor*[2], is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences), is on the Executive Authorities."

Manifestly the public would, in a large measure be interested in the manner in which he discharges his duties, and he could properly be considered, to be a person employed in connection with the affairs of the State The Collector determines the fee payable to him under the relevant rules and he is remunerated by the State. In *Ramachandran* v *Alagiriswami*[3], this Court observed :—

> " Nobody seriously doubts that the State Prosecutor in the City and Public Prosecutors in the mofussil are holders of public offices "

The next question for consideration is whether the appointment of Public Prosecutor is governed by any statutory provision or rule Our learned brother, Kailasam, J , has traced the rules as to the appointment of Public Prosecutor from 1895 The office is of ancient origin. Government Order dated 1st September, 1866, states that in every District Court there is a Government Pleader who is usually also the Public Prosecutor, and that he is nominated by the Collector and appointed by the Government The rule, more or less in the form now we have providing for consultation of the Sessions Judge before the nomination is submitted to the Government, is found as rule 142 in the Criminal Rules of Practice and Executive Orders published in 1910. The authority for the rule is G O No 1232 Judicial dated 12th August, 1901 The rule became rule 30 in the Criminal Rules of Practice and Circular Orders issued in 1931, after approval by the Government in G O Ms No 2420 dated 9th June, 1930 It is placed in Part I of the Rules consisting of rules under or in matter relating to the Code of Criminal Procedure The latest Criminal Rules of Practice and Circular Orders, 1958, received the approval of the Government in G.O Ms No 978, dated 10th April, 1957 which runs as follows :

> "The passing of the Indian Constitution and the Adaptation of Laws Order, as amended by the Adaptation of Laws (Amendment) Order, 1950, the Criminal Procedure Code (Amendment) Act, 1955 (Central Act XXVI of 1955), the Criminal Procedure Code (Madras Amendment) Act, 1955 (Madras Act XXXIV of 1955, Separation of the Judiciary from the Executive in this State, have necessitated the revision of the present edition of the Criminal Rules of Practice and Circular Orders, 1931. The High Court, Madras, has forwarded to Government

1. (1957) S C J 336 : (1957) S C R 279 : (1957) M L.J. (Crl) 247 : A.I R. 1957 S.C 389 at 393.
2. (1938) 2 M L J 780 L R 65 I A. 388 A.I R 1938 P C 266
3. I L R (1961) Mad 553 at 569

for approval a revised set of draft rules, judicial, Presidency Magistrate Court and Administrative Forms, rules and Orders under the special enactments and also important circulars and orders issued by the High Court in matters relating to the Judiciary.'

In exercise of the powers conferred by Article 227 of the Constitution of India and of all other powers hereunto enabling, the Governor of Madras hereby approves the revised rules, forms, circulars etc, forwarded by the High Court, Madras, with modifications as set out in the Appendix in these proceedings. The rules, form, etc, in the Appendix will be published in the Fort St. George Gazette as rules made by High Court with the previous approval of the Government of Madras "

The Preamble to the Rules published in 1958 reads :—

" Whereas it is expedient to amend, consolidate and bring up to date the Criminal Rules of Practice and Orders, 1931, and incorporate therein the orders, Notifications and Administrative instructions issued from time to time by the Government and the High Court, in exercise of the powers conferred by Article 227 of the Constitution of India and of all other powers hereunto enabling, and with the previous approval of the Governor of Madras, the High Court hereby makes the following Rules and Orders for the guidance of all criminal Courts in the State."

The Governor of Madras who approves the rules forwarded by the High Court, purports to exercise the powers conferred by Article 227 of the Constitution and all enabling powers It is necessary to set out the material part of clause (2) and the related Proviso to Article 227 which invests the High Court with power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdicition :

Article 227

" (2) Without prejudice to the generality of the foregoing provision, the High Court may

(*a*) call for the returns from such Courts ;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts ; and

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor."

We are in entire agreement with the learned Judge Kailasam, J, that the procedure relating to the appointment of Public Prosecutor can be said to relate to practice and proceedings of the Court. We have already referred to some of the important functions of the Public Prosecutor in the Districts with reference to criminal proceedings in Courts The power to frame rules for regulating the practice and proceed ings of criminal Courts can, in our view, properly include the qualifications of the person who has to function as Public Prosecutor in criminal Courts. Rule 45 cannot be considered inconsistent with the provision of section 492, Criminal Procedure Code, vesting the power of appointment of Public Prosecutor on the State Government. The rule does not, in the least, detract from the power of Government to appoint Public Prosecutor. It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule, the power to appoint Public Prosecutor still vests in the State Government and so the requirement of Article 227 for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force, is fully satisfied.

It appears to us that this rule could be sustained also under the Proviso to Article 309 of the Constitution. Under that Article, the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services

The Proviso to Article 309 enables the Executive also to make rules regulating the recruitment and the conditions of service, until provision in that behalf is made by an Act of the Legislature. The relevant part of the Proviso to Article 309 runs thus:

> "Provided that it shall be competent . . .for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

No doubt the rule in question does not purport to have been made under power conferred by Article 309 Usually when Government issues an order on the basis of a statutory provision, the provision of the statute in pursuance on which the order is made is specified But the omission of the authority for the order or rule, is not decisive. While approving the rules forwarded to Government by the High Court, it is proclaimed that they have been approved by the Governor of Madras in exercise of the powers conferred by Article 227 of the Constitution *and all other powers hereunto enabling.* The Criminal Rules of Practice contain provisions regarding various matters—rules relating to criminal procedure, judicial forms, etc. and within we find this rule relating to the appointment of Public Prosecutor with an ancient lineage of Government Orders dating back to 1866 If the High Court under Article 227 may not properly frame a rule with reference to the appointment of Public Prosecutor as a matter relating to practice and proceedings of Criminal Courts the rule should be deemed to have been made under the proviso to Article 309 which enables the Governor or such person as he may direct to make rules regulating the recruitment and the conditions of service to posts in connection with the affairs of the State. Sub-section (4) of section 96-*B* of Government of India Act, 1919 provided that all rules in operation at the time of passing of that Act, whether made by the Secretary of State in Council or any other authority relating to the several services of the Crown in India were duly made in accordance with the powers in that behalf and confirmed the rules. The original rule regarding the appointment of Public Prosecutor had acquired statutory force by virtue of section 96-*B* (4) of the Government of India Act, 1919 May be that the original rule is not continued. But in examining the character of the present rule, it is a factor to be taken into consideration. Why should we devalue after the Constitution when citizens are assured of the sovereignty of the Rule of Law, a rule that had statutory force, to an administrative direction to be followed at the discretion of the authority, when statutory basis could be found for the rule? When the Government approved the revised publication of the Criminal Rules of Practice and Orders, 1931 in G.O No 2420 dated 9th June, 1930, it is stated :

> "Under section 107 of the Government of India Act, and section 554 of the Code of Criminal Procedure and all other powers enabling him on this behalf, the Governor-in-Council is pleased to sanction, subject to the alterations mentioned below, the rules in Part I of the Criminal Rules of Practice and Orders and the forms thereunto appended· "

Section 107 of the Government of India Act, 1919 subject to certain modifications is similar to section 224 of the Government of India Act, 1935 Article 227 of the Constitution is a reproduction of section 224 with certain changes. The submission that rule is only for guidance of the Executive and non-adherence to the rule is not justiciable, is untenable In *State of Uttar Pradesh* v *Baburam*[1], Subba Rao, J. (as he then was), speaking for the majority, observed that statutory rules cannot be described, as or equated with administrative directions Of course, the Court was considering the Police Acts and Rules made thereunder for the appointment of Police Officers and prescribing procedure for their removal The clear and unambiguous expression in Article 309 of the Constitution that rules made by the Governor or such

1. (1961) 2 S.C.R. 679 : A I R. 1961 S.C. 751.

person as he may direct regulating the recruitment and the conditions of service of persons appointed, until provision in that behalf is made by or under an Act, shall have effect subject to the provisions of any such Act, must be given its full and unrestricted meaning Having regard to the history of the rule regarding the appointment of Public Prosecutor, in our opinion, the rule has been made under constitutional powers and so has statutory force, whether it is Article 227 or the Proviso to Article 309 that is relied upon. The appointment of Public Prosecutor for the districts does not rest solely on Standing Orders of the Government as was the case of the Government Pleader for Madras in *Ramachandran* v *Alagariswami*[1].

We have next to determine whether the appointment in this case is one that has been made without any regard to the statutory provisions. It is on this we have to differ with respect from our learned brother Kailasam, J. The relevant file has been produced for our perusal and we find the claim of the appellant justified that the appointee has not been nominated by the Collector for the post of Public Prosecutor and that it is the appellant that was recommended for the post. The counter-affidavits filed in this case, in fact, do not dispute the position It is seen from the file that, in July, 1967, applications were called for the post of Government Pleader-*cum*-Public Prosecutor which was originally in vogue in the district The District Bar Association furnished to the Collector names of 17 Advocates for consideration. There was then a proposal for bifurcation and appointment of separate individuals for the posts of Government Pleader and Public Prosecutor. The Collector referred the names of 17 Advocates given to him by the Bar Association to the District and Sessions Judge, North Arcot, to propose names for the posts of Government Pleader and Public Prosecutor separately on the assumption that there would be separate incumbents for the posts The District and Sessions Judge furnished two distinct panels of names under the two heads, a panel of names for the appointment of Government Pleader and another for the appointment of Public Prosecutor, each panel containing five names. The present appointee's name is found only in the panel of names for the appointment of Government Pleader and the appellant's name, in the panel of names for the appointment of Public Prosecutor. With reference to the present appointee who had a standing of six years and 4 months at the Bar, the learned District Judge recommended the relaxation of the provision in a Standing Order requiring seven years' standing at the Bar, there being a precedent for such relaxation The appellant was appointed as Additional Public Prosecutor, Vellore, in 1962 relaxing the requirement. The District and Sessions Judge, in recommending the present appointee for the post of Government Pleader, pointed out that the appointee was Standing Counsel for the Vellore Municipality and competent in his work.

The Collector in forwarding his nomination to the Government while expressing his agreement with the panels given by the District and Sessions Judge, specifically recommended that the appellant who was then Additional Public Prosecutor be appointed Public Prosecutor. No alternative name was given by the Collector for the post As regards the present appointee, the Collector added that he may be appointed as Additional Public Prosecutor The post of Additional Public Prosecutor would fall vacant if the present appellant was appointed as Public Prosecutor. The Collector expressed his view that the post of Additional Public Prosecutor should go to a young Advocate, so that he might be groomed and trained to become Public Prosecutor in course of time He remarked that the present appointee could conveniently pick up work under the guidance of the Public Prosecutor and equip himself for further responsibility in due course It is clear from the note of the District Collector that for the post of Public Prosecutor he nominated only one individual, that is, the appellant Far from sending up the name of the present appointee for the post even alternatively, he indicated that the present appointee has to abide his time. Our learned brother Kailasam, J , proceeded in the view that the letter of the District Judge to the Collector was not clear as to whether he recommended a person out of five names in the list to be appointed as Government Pleader and another person from the second list of five persons to be appointed as Public Prosecutor, and

1. I L.R. (1961) Mad. 553.

that the letter of the District Judge could be construed as recommending any one of the ten persons for appointment for either of the posts. If that were so, it is a matter for consideration. But as pointed out above, there is no ambiguity either in the panel of names sent by the Sessions Judge or, in the nomination made by the Collector. The Collector's recommendation and the letter of the Sessions Judge on the consultation, are precise as to what they state That apart, under the rule it is the Collector that has to make the nomination It must also be noticed that while the Collector has not recommended the present appointee for either of the posts then vacant, the District Judge who was consulted recommended the present appointee only for the post of Government Pleader. So neither the authority that has to be consulted under the rule, nor the authority that has to nominate, recommended the present appointee for the post of Public Prosecutor.

It was faintly argued on behalf of the respondents that the Collector only suggested the appointment of the appellant as Public Prosecutor and not nominated him. To nominate, as may be seen from any dictionary, means, to name or designate by name for office or place. Webster's New 20th Century Dictionary gives the word "nomination" among other meanings, "the naming or appointing a person to an office; the naming of a person as a candidate for election or appointment to an office. A meaning for the word "nominate" is 'to propose for office'. In the counter affidavit of the Secretary to the Government, Home Department, it is stated that the word "nomination" can only mean, naming, that is, recommending Clearly, whether it is naming, proposing or recommending, the Collector does name, propose or recommend only the appellant for the office, and he does not name, propose or recommend the present appointee for the post.

If rule 45 has statutory force unquestionably there is violation of the rule, in that the present appointee has not been appointed on the nomination of the Collector. The rule enjoins that the appointment be made on the nomination of the Collector As pre-condition to nomination a duty is cast on the Collector to consult the Sessions Judge before submitting his nomination to the Government. The appointment by Government of a Public Prosecutor for the District is thus conditioned by two requisites Firstly the Collector should consult the Sessions Judge Secondly, after such consultation, the Collector should submit his nomination to the Government. This does not mean that the Government is bound to accept the nomination sent up by the Collector. It is not the requirement of the rule that there can be only one nomination, and, once a nomination is sent up, it must be accepted by the Government To interpret the rule in that manner would be to make the Collector the appointing authority, and that he is not, under section 492, Criminal Procedure Code. And such an interpretation would make the rule *ultra vires*, whether it is a rule under Article 227 or Article 309. The Government is the appointing authority and it is the Government that has to take the final decision. It may not approve of a nomination sent by the Collector. It may require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. Only, for appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post.

The object of the requirements of the rule is self-evident The subject-matter is such that the requirements of the rule cannot be considered to be empty formalities. They are intended to secure to the Government, the appointing authority, real assistance. The Sessions Judge is expected to know the suitability or otherwise of the members of the Bar in his Sessions Division for the post He has opportunities to appraise their fitness having regard to their standing in the Bar and the confidence they command The Collector, the executive head in the district, may be properly expected to offer his advice in the matter He is required under the rule to act in consultation with the Sessions Judge, the appropriate authority, to give advice for the selection The consultation which has to precede nomination by the Collector is obviously intended to secure a conference of two minds eminently fitted for the task In *Pushpam* v. *State of Madras*[1], Subba Rao, J , as he then was) observed:

1. (1953) 1 M.L.J. 85 at 90.

"Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty It is true that the final order is made and the ultimate responsibility rests with the former authority But it will not, and cannot be, performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions."

It is manifest on the facts that rule 45 has been violated.

It is submitted that the appointment is an executive or administrative act of the Government and so is not justiciable True the appointment is an administrative act. But if it contravenes the law, Courts can intervene even with an act of the Executive Authority Here no absolute discretion is vested in the Government for making the appointment The appointment has to be made in accordance with a rule, and a procedure prescribed has to precede the appointment Having regard to the post to be filled up, the procedure prescribed cannot be considered to be purely directory. While the decision is that of the Government, and it may be an executive decision, the discretion given to the Government in the matter is circumscribed by the rule and it is within the four corners of the rule that the discretion must be exercised. As pointed out by Lord Greene, M R in *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation*[1] the exercise of such discretion must be a real exercise of the discretion The Master of the Rolls said :

"If in a statute conferring the discretion there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to then in exercising the discretion it must have regard to those matters."

Rules made under statutory powers, unless they are constitutionally invalid, must be adhered to. Statutory rules which are functional in character are not made to be violated at the caprice of the Executive Authority concerned. There is no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law. Douglas, J., in *United States* v. *Wunderlich*[2] expressed in language which must ever be borne in mind by those that would govern and the governed :

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. Where discretion is absolute, man has always suffered."

In *Jaisinghani* v. *Union of India*[3], the Supreme Court spoke for our Constitution in these words :

"In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our own Constitutional system is based In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law."

Learned Counsel for the appellant drew our attention also to the decision of the Kerala High Court in *K M Joseph* v. *State*[4], where, relying on the observations of the Supreme Court quoted above, it was held that the right of a State to make appointments to its service is not arbitrary

A subsidiary point was raised for the appellant that the appointment was made on extraneous considerations and so can be quashed even if the rule has no statutory force. It is alleged in the affidavit in support of the application for *quo warranto* that the only consideration which weighed with the Government is that the present

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1. L R (1948) 1 K B 223
2. (1951) 342 U S 98.
3. (1967) 1 I.T.J. 903 : (1967) 2 S.C.J. 102 A I R. 1967 S C 1427 at 1434.
4. A.I.R. 1968 Ker 244.

appointee is an active member of a particular political party. The argument based on this is, that considerations wholly not germane have weighed with the appointing authority, and, even if there is wide executive discretion in the matter of the appointment, the discretion is vitiated

The Court's province in this regard is well settled In *Raja Anand* v *State of U.P* [1] the Supreme Court observed :

> " It is true that the opinion of the State Government which is a condition for the exercise of the power under section 17 (4) of the Act (Land Acquisition Act), is subjective and a Court cannot normally enquire whether there were sufficient grounds for justification of the opinion formed by the State Government under section 17 (4) . But even though the power of the State Government has been formulated under section 17 (4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as *ultra vires* in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is *mala fide*."

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion *See Maxwell's* On the Interpretation of Statutes, 11th Edition, page 118 When considerations extraneous to the suitability of a person for appointment are taken into account in making an appointment, there is an abuse of discretionary power, and so the exercise of power exceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds It could then well be said that Article 16 which provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and Article 14 are violated While the fitness of a person to an office may be solely within the discretion of the appointing authority, the discretion, as has been repeatedly pointed out, must be exercised *bona fide* Wade, in his Administrative Law, at page 59 quotes Lord Halsbury's remark:

> "....'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion. . according to law, and not humour It is to be, not arbitrary, vague and fanciful, but legal and regular."

Arbitrary discarding of existing rules, be they administrative, and improvising *ad hoc* procedure for particular cases, is a dangerously unhealthy trend, as it may descend to " *ad hominum* " procedure and give room for comments of favoured treatment violative of Article 16 While Courts will not interfere with the choice of an individual with reference to an appointment made in the due exercise of its discretion by the Government without shutting out of consideration the claims of others for the post, Courts will certainly stand guard and are bound to do so, in a democracy, against flagrant abuse of powers on the simple and sound principle that the Constitution 'cannot have intended powers to be abused beyond what might be called the inevitable area where opinions may legitimately differ '

While the principles which the appellant seeks to invoke are well settled, in our opinion, there is no room in this case for striking down the appointment in question on principle of arbitrary or capricious exercise of discretion and favoured treatment without any regard to established norms in the matter of the appointment. The appellant seeks to clutch at an averment made in the counter affidavit of the Secretary to the Government, Home Department, while denying the charge that active association of the appointee with the party in power is the basis of the appointment. Unfortunately, and as it strikes us, without appreciating the inference which the language employed could lead to the denial is thus expressed

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1. (1967) 1 S.C.R. 373: (1967) 2 S.C.J 830: A.I.R. 1967 S.C. 1081 at 1085.

"It is specifically denied that the only consideration that weighed with the Government in exempting the first respondent was his association with the D M K."

But reading this averment in the light of the allegation in the affidavit which is traversed thereby and the setting in which it is found in the counter affidavit, it is clear that the statement in the counter affidavit was not meant to be an acknowledgment that the affiliation with the party in power was one of the considerations for the appointment, though not the only one The record and the file relating to the appointment which we have perused, do not warrant judicial inference of extraneous consideration like the one alleged by the appellant to have been the basis of the choice The fact that an aspirant for office happens to be an active member of a political party in power by itself should not and cannot disqualify him if otherwise suitable from being appointed to a post To make that a point against him when there is no legal bar, would be to exclude him from consideration for the post on wholly irrelevant grounds. The present appointment has to go on the sole ground that the appointee is not a nominee for the post sent up by the Collector Neither the nomination of the Collector, nor the recommendations of the Sessions Judge which accompanied it has manifestly been relevant material in deciding on the appointment.

A point was taken for the appellant questioning the exemption granted to the appellant in respect of the requirement as to seven years standing at the Bar This requirement is to be found in the Standing Orders relating to the appointment of Law Officers in the mofussil It is not made out that this Standing Order has any statutory force, and it may be pointed out that the appellant himself got exemption when he was appointed as Additional Public Prosecutor In *Ramachandran* v *Alagiriswami*[1], the Division Bench points out that such Standing Orders of the Government regarding appointment to an office are devoid of statutory force and remain merely as declarations—no doubt public and explicit declarations—but still only declarations by Government of their intention and line of conduct Such Standing Orders have no legal sanction behind them and the Government may, in suitable cases in the exercise of discretion, relax the rules

Learned Counsel for the first respondent submitted that the appellant invoking the special extraordinary jurisdiction of this Court has not come with clean hands and is therefore disentitled to relief It is urged that in his affidavit the appellant stated that the first respondent has not been enrolled in the Madras High Court and he is an Advocate of the Mysore High Court This is clearly contrary to facts, and, in his reply affidavit, the appellant contented himself with the statement that in view of the assertion of the first respondent he withdrew this contention The appellant, in his reply affidavit, did not categorically admit the true position The learned Judge, Kailasam, J , points out that, if the appellant had taken some care and looked into the list of the Bar Council, Madras, he would not have made the allegation, and that, in any event, after the specific statement by the first respondent, the appellant could have withdrwan his allegation without any qualification However, before the learned Judge, Counsel for the appellant submitted that the defect in pleadings in this regard was unintentional Unqualified regret on behalf of the appellant was expressed and the learned Judge who dealt with the writ petition, did not think it necessary to pursue the matter any further Learned Counsel for the first respondent submitted that, before granting a writ of *quo warranto*, it is necessary to see that the relator is a fit person to be entrusted with the writ and reference was made to the decision in *Miss Cama* v *Banwarilal*[2], for the proposition that a relator must nor be disqualified by having acquiesced or concurred in the act which he comes to complain of. We fail to see the relevance of the decision in the context of this case. True, an averment has been made in the affidavit in an irresponsible manner while challenging the validity of the first respondent's appointment A little care and attention and a sense of responsibility in making the averment against a brother member of the Bar would have avoided this One may say that the allegation has been made recklessly But it has been atoned for by unqualified regret at the hearing and the

1. I L.R. (1961) Mad. 553. 2 A.I R 1953 Nag. 81.

learned Judge has accepted the same Though the appellant himself is personally interested in the proceeding, being an aspirant for the office, still we cannot ignore the fact that the matter is one in which the public can be said to be equally interested and concerns the administration of Justice

It follows that the order of the Government G O Ms No 231, Home Department, dated 30th January, 1968 appointing the first respondent as Public Prosecutor for the North Arcot Sessions Division has to be quashed The Government will have to proceed afresh in the matter to fill up in accordance with law the post which thus falls vacant. The appellant has applied for *mandamus* to act upon the only nomination sent up by the Collector and appoint him as Public Prosecutor for the term This relief, he cannot have. As observed earlier, the Government is not bound to accept a nomination sent up by the Collector. It cannot be contended by the appellant that the Government is withholding from him a post to which he is entitled to, for the issue of a writ of *mandamus* The appellant can claim only that he should be considered for the post. We should here observe that in these proceedings we are not concerned, in the least, with the merits or qualifications of either the appellant or the first respondent The suitability of an applicant is for the authorities to decide.

We accordingly allow W P No. 436 of of 1968, quashing the order appointing the first respondent as Public Prosecutor The question of filling up the post of Public Prosecutor, North Arcot district will be taken up by the Government for consideration in the light of the observations made herein. W. A No 179 of 1968 is therefore allowed and W A No 180 of 1968 dismissed The parties will bear their respective costs throughout.

S.V J. ——— *W.A. No* 179 *of* 1968 *allowed*; *W A No* 180 *of* 1968 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

The Ammapet Handloom Weavers' Co-operative Production and Sales Society, Ltd. Salem, by its President, and others ... *Petitioners**

v.

K. S. Kadalaimuthu and others ... *Respondents*

Madras Shops and Establishments Act (XXXVI of 1947), *section* 41—*Employees failing to turn up for work at the office—Employers removing their names from the list of Employees—Order of the employer, if amounts to dispensing with their services under section* 41.

None of the employees (first respondents) presented themselves before the society (employer) either at the office they were serving or at the office to which they were transferred. After waiting for nearly 1½ months and presuming that the employees had stopped away from the service, the society intimated to them that their names were being removed from the list of employees.

Does the order amount to dispensing with their services under section 41 of the Madras Shops and Establishments Act ?

Held that, The order in question amounts only to making a record of the fact that the employees had failed to turn up and that they were no more in employment. The society is under no obligation to wait indefinitely and were within their rights in removing the employees' names from the list of employees

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will

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*W.P Nos 1978, 2510, 2511, 2512 and 2677 of 1967 — 16th October, 1968.

be pleased to issue writs of *certiorari* calling for the records in M.S.E Act Case No. 25 of 1965, M S E Act Case No 20 of 1965, M S E Act Case No. 19 of 1965, M S E. Act Case No. 24 of 1965 and M S E. Act Case No. 22 of 1965 dated 28th February, 1967, on the file of the Additional Commissioner for Workmen's Compensation, Coimbatore, and quash the said orders made therein.

T. R. Srinivasan, for Petitioners.

S. T. Ramalingam, for the Government Pleader, for Respondents 2 and 3

The Court made the following

ORDER.—All these writ petitions raise the same question, and they can be dealt with together. The first respondents in the five writ petitions are employed under the petitioner, the Ammapet Handloom Weavers' Co-operative Production and Sales Society Ltd. The first respondent in W P No 1978 of 1967 K. S Kadalaimuthu was transferred from Ammapet to Erode on 28th January, 1965 directing him to join at Erode on 1st February, 1965. The first respondent asked for an advance of Rs. 200 and ten days' time to join. This was refused. The employee, first respondent, did not turn up, and the society on 16th March, 1965 passed an order stating that the employee has not reported at the depot to which he was transferred, though he was required to join on 1st February, 1965 and that he had not made any application for leave for not joining duty and hence he was removed from the list of employees. The first respondent in W P. No. 2510 of 1967, P. S Guruswami, was transferred from Ammapet to T'Nagar on 28th January, 1965 with a direction to join on 1st February, 1965 He also asked for an advance of Rs. 200 and for two weeks' leave It was not given On 16th March, 1965 the society passed an order similar to the one referred to in Writ Petition No 1978 of 1967. The first respondent in Writ Petition No 2511 of 1967 S J Abdul Razack was transferred from Salem to T'Nagar by an order on 9th January, 1965 He was asked to join at T'Nagar on 5th February, 1965, on the expiry of his leave On 8th February, 1965 he asked for an advance of Rs. 200 and that advance was not given He did not present himself subsequently, and on 16th March, 1965 the society passed an order similar to the one referred to, in Writ Petition No 1978 of 1967 The first respondent in Writ Petition No 2512 of 1967, Sahadevan, was transferred from Salem to Tirunelveli on 18th January, 1965 directing him to join on 28th January, 1965. He claimed an advance of Rs. 60 and time The advance and the time asked for were refused. He failed to turn up On 16th March, 1965 the society passed an order similar to the one in Writ Petition No 1978 of 1967. In Writ Petition No. 2679 of 1967 the first respondent Sadasivam was transferred from Erode to Salem on 28th January, 1965 with a direction to join duty at Salem on 4th February, 1965. On 9th February, 1965 he asked for an advance of Rs. 100 and time upto 15th February, 1965. The request was refused and the first respondent applied for leave from 15th February, 1965 to 28th February, 1965 But the leave was not granted, and on 16th March, 1965 the society passed an order similar to one in Writ Petition No 1978 of 1967 It may be mentioned that all the employees, except Sahadevan, were entertained by the society from 17th March, 1965 The first respondent in Writ Petition No. 2512 of 1967, the said Sahadevan, did not join duty.

The abovesaid employees filed an appeal under section 41 of the Madras Shops and Establishments Act against the order of the President Ammapet Handloom Weavers' Co-operative Production and Sales Society, Ltd, dated 16th March, 1965. The case of the employees is that the order dated 16th March, 1965 amounted to some sort of dismissal or discharge, and the order clearly indicated termination of service and settlement of accounts The Additional Commissioner for Workmen's Compensation found that there was termination of service, that section 41 of the Madras Shops and Establishments Act was applicable and that as the procedure envisaged in the section was not followed, the order of the management dated 16th March, 1965 is not valid. In these writ petitions the society contends that the order dated 16th March, 1965 would not amount to dispensing with the services of the employees. The facts disclosed that though the order of transfer was passed on 28th January, 1965 in two cases, on 9th January, 1965 in one case, on 18th January, 1965 in another

case, and on 28th January, 1965 in another case directing the employees to join duty on different dates, none of the employees presented themselves before the society either at the office they were serving or at the office to which they were transferred It is not incumbent on the employer to wait indefinitely for the employee to turn up. After waiting for nearly 1½ months, the society presumed that the employees, the first respondents in these writ petitions, stopped away from the service The order, after stating the facts, intimated that the names of the employees were being removed from the list of employees The order dated 16th March, 1965 would not amount to dispensing wihe services, but only making a record of the fact that the employees had failed to turn up and that they were no more in the employment The society is under no obligation to wait indefinitely and were acting within their rights in removing the employees' names from the list of employees On the facts of the case, I am unable to accept the contention of the learned Counsel for the employees-respondents that the order dated 16th March, 1965 would amount to dispensing with the services of the persons employed, under section 41 of the Act The order dated 16th March, 1965 is, therefore, perfectly valid and cannot be challenged. The order of the Additional Commissioner for Workmen's Compensation is set aside.

It was submitted by the learned Counsel for the petitioner that the employees-respondents were taken back into service as fresh entrants But the learned Counsel for the employees submitted that this was not the stand of the society in their counter affidavit. It is unnecessary to go into that question as it is not relevant for the purpose of decision in these writ petitions

The petitions are allowed. There will be no order as to costs.

V.M.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Pachai Ammal and others ... *Appellants**

v.

A T.P. Thirugnanasambandam Chetty and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 57—*Court dismissing the execution petition but directing the attachment to continue for a further period—Effect and validity of—Whether such order void.*

Civil Procedure Code, Order 2, *rule* 2—*Different cause of action—Later suit not barred.*

Held, In this case the Court specifically directed the attachment to continue for three months Even assuming that the dismissal was because of the decree-holder's default the order directing the attachment to continue cannot be said to be an order made without jurisdiction It may be a wrong order but it is certainly not an order made without jurisdiction Therefore it is difficult to say that the order directing the attachment to continue for three more months is a void one and that therefore no effect should be given to it. When the lower Court directed that the attachment would continue for a period of three months it means that it was satisfied that it was dismissed not for the default of the decree-holder, and that is the reason why it allowed the attachment to continue for three more months.

The earlier suit was for possession of the whole property. The present suit is only for partition and possession of the plaintiff's half share. The cause of action for the two suits being quite different, the latter suit is not barred under Order 2, rule 2.

Appeal against the Decree of the District Judge of North Arcot at Vellore in Appeal Suit No 188 of 1963, preferred against the decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No 94 of 1961.

K. Sarvabhauman and *T.R. Mani,* for Appellants.

R. Muthukumaraswamy, for Respondents.

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*S. A. No. 1888 of 1964. 31st October, 1968.

The Court delivered the following

JUDGMENT.—The third defendant is the appellant. He is a purchaser of the suit properties from the first defendant and one Alamelu Ammal to whom the properties belonged by a sale deed dated 7th September, 1952 In execution of a decree obtained against the first defendant and Alamelu Ammal in O S No 130 of 1949 the suit properties were attached in R E P No 358 of 1952 That petition was dismissed on 13th October, 1952 keeping the attachment alive for three months The next execution petition R E P No 816 of 1952 was filed on 19th November, 1952 and in that execution the plaintiff became the purchaser of the whole of the suit properties. Thereafter the plaintiff filed O S No 374 of 1955 for possession of the properties he purchased in Court auction Alamelu Ammal's legal representative, that is the present second defendant (daughter) filed an application for setting aside the sale on the ground that on the date the sale took place her mother had died. This application was ultimately allowed and the sale as far as Alamelu Ammal' s share was concerned was set aside The suit, O S No 374 of 1955, filed by the plaintiff was also allowed to be dismissed Thereafter he filed the suit out of which the second appeal arises for partition and possession of the half share to which he is entitled.

Three contentions were taken on behalf of the contesting third defendant. The first was that as R E P No 358 of 1952 had been dismissed for default the order keeping alive the attachment for a period of three months was wrong and therefore the sale in R E P. No 816 of 1952 was not a valid sale so as to give the plaintiff a right even to a half share in the properties sold The second was that the earlier suit by the plaintiff for possession of the whole of the properties having been dismissed this suit is barred under Order 2, rule 2 The third was that the plaintiff was entitled to mesne profits only from the date of the suit The Courts below have held against the appellant on all these points I shall first deal with the first point.

The sale in favour of the third defendant was during the pendency of the attachment which had been ordered on 13th October, 1952 in R.E P No 358 of 1952 to continue for 3 months The contention of the third defendant as already mentioned was that this order allowing the attachment to continue for a period of three months was contrary to the provision of Order 21, rule 57, and is therefore not a valid order, that the attachment should therefore be deemed to have ceased on 13th October, 1952 and therefore the Court auction purchase by the plaintiff will not prevail against the sale in favour of the third defendant. Order 21, rule 57, is in the following terms :

> " 57 (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date it shall state whether the attachment continues or ceases, provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease. "

The argument in this case is that as R E. P. No. 358 of 1952 was dismissed on 13th October, 1952 because encumbrance papers were not submitted it should be deemed to be a case of decree-holder's default and therefore the attachment ceased. The rule itself states that where the dismissal of execution application is by reason of the decree-holder's default the order of the Court shall state that the attachment do cease Supposing for instance an order does not say that the attachment shall cease It may well be argued that unless the Court directs the attachment to cease the attachment would not cease But we are not concerned with a case of that kind In this case the Court specifically directed the attachment to continue for three months. Even assuming that the dismissal was because of the decree-holder's default, the order directing the attachment to continue cannot be said to be on an order made without jurisdiction. It may be a wrong order but it is certainly not an order made without jurisdiction Therefore it is difficult to say that the order directing the attachment to continue for three more months is a void one and that therefore no effect should be given to it.

The appellant relied upon a decision in *Namuna Bibi* v *Rosha Miah*[1], where it was held that where there was an order to the effect,: "The execution case is

1. (1911) I.L.R 38 Cal. 482.

accordingly dismissed, the properties will remain under attachment"... the subsequent application for execution without issuing a fresh attachment should notwithstanding the order continuing the attachment, be dismissed At that time Order 21, rule 57 specifically stated that upon the dismissal of an application the attachment shall cease Under the present rule the attachment does not automatically cease but the Judge shall direct that the attachment shall cease, if he does not so direct it may be argued that the attachment would not automatically cease In any case where the learned Judge directs that the attachment shall continue it is not possible to say, as I already stated, that it is an order made without jurisdiction

Reliance was however placed on behalf of the appellant, on the decision of a Bench of this Court in *Venkata Rao* v *Surya Rao Bahadur*[1] It was there held that the language of Order 21, rule 57 does not make it a condition precedent for the termination of the attachment that the Court should make an order that the attachment ceases, that it merely directs the Court to state the consequence of the dismissal, that is the termination of the attachment That it is the dismissal by reason of the decree-holder's default that brings about the termination of the attachment and the Court is merely directed to state in the order that consequence and that if the Court omitted to state so it would not prevent the attachment from coming to an end. Even this case, it should be noticed, did not deal with a situation where the Court concerned specifically made an order that the attachment will continue

This decision has been noticed in a subsequent Bench decision of this Court in *Murugappa* v *Nayanim*[2]. Referring to the observations in the earlier decision the Bench stated as follows :

> " The order in that case which was construed by the learned Judges as an order of dismissal on account of the decree-holder's default was as follows· 'The petitioner had ample time even after filing the E P. Rejected' The reference is to the production of the encumbrance certificate The learned Judges held that this was an order of dismissal on account of the default of the decree-holder, the attachment ceased even though the Court omitted to state that the attachment would cease. As was observed by the learned Judges in that case, it is not open to us to canvass the correctness of the order. The only question is whether the order dated 2nd January, 1943 could be construed as an order of dismissal The learned Judges in that case found no indication in the order to show that what the learned District Munsif wanted to do was merely to adjourn the petition Ultimately, we have to determine on the circumstances and facts of the case before us what was intended and what was expressed by the learned Judge when he passed the order. In our opinion, it is clear that the learned Judge did not dismiss the application. Still less did he indicate that there was default on the part of the decree-holder which deserved a dismissal. On the other hand, the opening words of the order keeping the attachment alive make it abundantly clear that the Judge did not intend to dismiss the application and thereby to raise the attachment What he did was to keep the attachment alive and to permit the decree-holder to apply for the proclamation of sale of the attached properties by means of a fresh petition Once we hold that there was no dismissal of the execution petition for the default of the decree-holder, the law is clear that the attachment would continue, especially when the Judge himself directed that it should continue till the decree was fully satisfied. It follows therefore that on the date of the sale in favour of defendant 6 *i e*, on 12th December, 1942, there was a valid attachment subsisting in pursuance of which eventually the Court sale took place and the plaintiff became the purchaser."

This decision would apply exactly to the facts of the present case When the learned Judge in R E P No 358 of 1952 directed that the attachment would continue for a period of three months it means that he was satisfied that it was dismissed not for the default of the decree-holder, and that is the reason why he allowed the attachment to continue for three more months

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1. I.L.R. (1950) Mad. 39 : (1949) 1 M L.J. 320.

2. (1950) 1 M L J 1 : I.L.R. (1950) Mad. 779: A.I.R. 1950 Mad. 314.

The next decision is that of Basheer Ahmed Sayeed, J., in *Govinda Padayachi* v. *Kannammal*[1]. At page 205 the learned Judge observed :

"If the Court had intended that the execution petition should be treated as dismissed for default and that the proceedings should terminate finally, it would have felt bound to order that the attachment was also to cease But the Court exercised its discretion actually the other way"

In *Krishnaswami Iyengar* v *Vedavalli Ammal*[2], Ramachandra Iyer, J, (as he then was) considering a similar situation remarked :

"The fact that in the present case the attachment was ordered to continue would show that E. P. No. 661 of 1955 was not dismissed for default."

The latest judgment of this Court is in *Palaniappa* v *Muthu Veerappan*[3]. There Natesan, J, referred to the earlier decision of Basheer Ahmed Sayeed, J., as well as of Ramachandra Iyer, J, as he then was, after observing as follows :

"At this stage the correctness of the order on the E P is not open to challenge. This Court has only to interpret the order, and when one finds the Court continuing the attachment, the proper interpretation would be the execution petition itself is not being terminated but adjourned for the nonce. We cannot readily assume that the Court intended passing a patently illegal order."

The appellant then sought to rely upon a decision of the Andhra Pradesh High Court in *Kangayya* v *J Reddeyya*[4] That was a decision of Chandra Reddy, C J, and Narasimhan, J., The Bench referred to the decision in *Venkata Rao* v. *Surya Rao Bahadur*[5], but the subsequent decision of a Bench of this Court to which Chandra Reddy, C J., was himself a party, was not referred to. In any case that decision merely dealt with a case where the petition was dismissed for default and did not state that the attachment would cease and it was held that the attachment would in any case cease because of the wording of the rule in Order 21, rule 57. It was not concerned with a case where the Court ordered the attachment to continue. It is therefore clear that where a Court dismisses an application for execution and allows the attachment to continue, the position is not the same as where the petition is dismissed and nothing more is said In the latter case it may be said that the attachment would cease as held in *Venkata Rao's case*[5] :

As regards the next point about Order 2, rule 2, it is not clear how that provision of law applies here at all It is enough to say that there is no substance in this contention. The earlier suit was for possession of the whole of the property. The present suit is only for partition and possession of the plaintiff's half share. The cause of action for the two suits is quite different. As regards the third point there is really no question of mesne profits as between two co-owners. It is really a case of accounting. I do not think therefore that the judgment of the Court below calls for interference on any of the grounds suggested.

The Second Appeal is dismissed. There will be no order as to costs. Leave granted.

S.V.J. *Appeal dismissed.*

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1. (1957) 1 M L J. 201.
2. A.I R. 1959 Mad. 218.
3. (1965) 2 M L J. 499: I L R. (1966) 2 Mad 211: A.I.R. 1966 Mad. 4
4. A I R. 1960 A P 634.
5. I.L R. (1950) Mad. 39 (1949) 1 M.L.J. 320.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN

R Venkata Subbu and others *Petitioners*[*]

v.

The Director of Enforcement, Enforcement Directorate, New Delhi and another .. *Respondents.*

Foreign Exchange Regulation Act (VII of 1947), *sections* 4 (1), 12 (1), 12 (2) *and* 23—*Interpretation—Appellants failing to repatriate the foreign exchange representing the Full Export Value of The Goods, but pleading guilty to charge under sections* 4 (1) *and* 12 (2)—*Formal defect in the charge—Court, if could exercise its jurisdiction under Article* 226 *of the Constitution on account of such formal defect in the charge*

Constitution of India, (1950), *Article* 226—*Writ jurisdiction—Depravity of conduct intrinsic to the very proceedings or lis—Depravity, not extraneous immorality of conduct—Court if could grant relief based on recognition of such depravity*

Foreign Exchange Regulation Act (VII of 1947), *section* 23 (1)—*Exercise of a* quasi judicial *discretion by the Director in awarding the penalties—Court not to take cognizance of an offence punishable under section* 23 (1) *except on a complaint by the Director of Enforcement—Section* 23 (1), *if offends Article* 14 *of the Constitution.*

Constitution of India, (1950), *Article* 226—*Existence of alternative remedy—Appeal only if the deposit is made—Appellant, if could by-pass the statutory remedies and pray for relief under Article* 226.

The Foreign Exchange Regulation Act (VII of 1947) was enacted as it was considered expedient in the economic and financial interests of India to provide for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion.

A major and indisputable fact, in all these cases, is that the relevant declarations and licences were upon the scale of figures that were heavily *over-invoiced* These figures did not represent any existing or even remotely probable contracts for sale and purchase at the foreign markets, but were fictitious The parties invited adjudication, made voluntary and full disclosures and with full knowledge and consciousness of their acts, pleaded *guilty* to charge under section 4 (1) and section 12 (2) of the Foreign Exchange Regulation Act The Director repeatedly states that the concerned parties failed to repatriate the foreign exchange representing the *full export value of the goods ; that* is the charge to which the pleas of *guilty* have been made.

The main argument has, throughout, been this. When the Director tacitly accepts *over-invoicing* in his narrative of the prior events, it is claimed that there is a manifest inconsistency between this, and his finding that the offence under section 12 (2) has been established. But the true answer to this is that, in the one instance where the Director had jurisdiction for considering this argument, since other instances were covered by pleas admitting the guilt, he makes it clear that he is aware of this distinction But he holds the parties, in effect, to their assurances in the relevant certificates. In terms of these assurances, though the terminology might have been erroneous in one or other context, what he finds is that these persons manifestly failed to repatriate the foreign exchange representing the *full amount payable by the foreign buyer,* which has to be taken in the light of the certificates as identical with the *full export value* The orders have to be construed in the situations in which they were made, the parties having invited the adjudication, and deliberately pleaded *guilty to* the charge under section 12 (2) of the Act Even if there be a formal defect in the charge, in the light of those facts, the Court will clearly be justified in declining to exercise its jurisdiction under Article 226 of the Constitution.

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* W P Nos 3235 etc. of 1965 etc. 2nd February, 1967.

If in relation to the proceedings a party approaches this Court for the issue of a writ of *certiorari* with a record of depravity of conduct intrinsic to the very proceedings, the Court has every right and, indeed, the duty to decline him relief Equally, a party cannot pray to the Court for relief, based on the recognition of his own fraud or fraudulent contrivances, the substance of his defence being that the recognition of this fraud will preclude the application of some other provision of law to his case, in these instances, section 12 (2) of the Foreign Exchange Regulation Act This is also depravity arising out of the very *lis*, and not at all irrelevant thereto, or merely some extraneous immorality of conduct In all these cases, on this ground alone, the Court would be justified in declining the relief

In deed, it is difficult to see how section 23 (1) offends Article 14, in the sense of a statutory discrimination without a reasonable classification or basis. It is true that under section 23 (3) (*a*) a Court cannot take cognizance of an offence punishable under section 23 (1), except on a complaint in writing by the Director of Enforcement But the Director is not left without any statutory guidance in respect of the exercise of his discretion, whether to act under section 23 (1) (*b*)

There are statutory appeals provided including an appeal on a point of law to this Court, and the imposition of the fine is a quasi-judicial act; the test of the quantum must clearly be in the gravity of the offence.

Where, the extraneous matter, so-called truly relates to statements made by parties in the very proceedings, which are relevant material, it is difficult to see how this argument of intrusion of prejudicial matter can be sustained It may be that, here and there, the Director has used somewhat strong expressions, they represent his reactions to the disclosures, and cannot be termed unnatural, though it may be claimed, that he should have been more careful, and that he should have used more neutral terms However that might be such facts, as the procurement of import licences on the basis of fictitious declarations and possible profits from those licences (whether directly or by assignment-sales) have been, mainly taken by the Director into consideration, with regard to the penalties to be imposed in these cases Surely, those facts are not irrelevant for that purpose, though *over invoicing per se* is not the offence punishable under section 12 (2) at all.

Section 23-E provides for appeals, and it is difficult to see how the existence of such remedies can be ignored by this Court, merely because the Appellate Board can entertain the appeal only if the deposit is made, or at the highest for the party, if the deposit is actually made before the hearing of the appeal is taken up. These may be hard terms, but the Legislature has deliberately enacted them, as part of the statutory procedure for appeals, which are themselves creatures of statutes. Merely because such deposit has to be made, the assessee cannot by-pass the statutory remedies There is a further, appeal to this Court on any question of law, under section 23-EE of the Act

It is the nominee or the agent who appears to have obtained the foreign currency for the concerned petitioners, and converted the foreign currency into Indian currency. But even this may well fall within the ambit of section 4 (1) of the Act. Concerning the point, that the word *person* may not include a firm at all, the matter would appear to be concluded by the definition of that word in section 3 (42) of the General Clauses Act.

Per Natesan, J.—It may be that he is pleading his own fraud and falsity to escape from the penalty provided under the section, a deliberate dereliction of duty and an offence to society in the present context of the country's economy of a very grave nature. But penalties are purely creatures of the Legislature. They cannot be created by judicial implication and must be expressly imposed by a statute. For the imposition of a penalty the provision of law must be clear and free from doubt Laws imposing penalties cannot be extended by construction to anything beyond the letter of the law even though within their spirit It must be noted that in this case section 23 provides also for criminal prosecution where heavy

punishment is necessary. The language of the statute cannot be construed as having one meaning if criminal proceedings are brought and a different meaning when penalties are imposed

Petitions under Article 226 (1) (*a*) of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed with Writ Petition Nos 3235 and 3651 of 1965, etc, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the orders of the respondents, dated 24th July, 1965 in No MF/ENF IV/314/65 (Writ Petition No 3235/65) and in procedings No MF/ENF IV /323-327 of 1965, dated 27th July, 1965, on the file of the second respondent in Writ Petition No 3651 of 1965, relating to the proceedings pursuant to the Order MF/ENF IV /223-241/65, dated 25th May, 1965, on the file of the first respondent levying a penalty under section 23 (D) of the Foreign Exchange Regulation Act and all the proceedings levying penalties and direct the refund of penalties recovered from each petitioner and to quash the said orders made there in.

R. M Seshadri for *N. Sivasankaran, V K Thiruvenkatachari* for *G Ramaswami, P. Raghaviah, V N. Krishna Rao* and *A. R Ramanathan, K Rajah Ayyar* for *N C. Ananthachari, S Govind Swaminathan* for *A C Muthanna, M R Prabhu* and *Habibullah Badsha, M K Nambiyar* for *K K Venugopal* and *S Ramalingam, V P Raman, K. Srinivasan (Mysore Bar) S V Subramaniam, K. J. Chandran, S Mohan* and *K Kumaraswami Pillai*, for Petitioners

Advocate-General (*S. Mohan Kumaramangalam*) and *Government Pleader* (*G. Ramanujam*), for Respondents.

The Court was delivered the following Judgements

Anantanarayanan, C J—This group of writ petitions arises from orders of the Director of Enforcement, New Delhi, exercising powers under the Foreign Exchange Regulation Act (VII of 1947), and the Adjudication Proceedings and Appeal Rules, 1957, formulated by the Central Government under section 27 of the Act. In all these cases, we propose to deal, in these judgments, with certain general grounds and issues that have been elaborately argued before us, the individual cases will then have to be taken up and dealt with, in the light of our judgments The main reason for this procedure, which has commended itself to us as the course best adapted to the ends of justice in these cases, is that there are also special issues of fact relevant to individual instances, that would require separate treatment. For instance, in one case at least, the learned Advocate-General, appearing for the Government of India, has been fair enough to concede that the very basis of the figures on which the adjudication was made and penalties levied by the Director of Enforcement, in that case, was misconceived, the adjudication has, therefore, to be necessarily set aside In other individual cases, there are special grounds such as an alleged absence of adequate opportunity to show cause, or uncertainty with regard to the firm or individual really penalised, etc. This explains why the present procedure has been adopted, and also the scope of the present judgments.

As a separate enclosure to this judgment, a table is appended, with regard to the first six out of these cases, as an illustrative statement The columns relate to the names of the parties or firms concerned, the value of the exports as per the G R. 1 forms, the amounts realised, the amounts outstanding, the purchase of foreign exchange by the party in contravention of section 4 (1) of the Act, the value of the import licences obtained, figures relating to the sale of such import licences by the party, where these were available and, finally, the penalty or penalties imposed by the Director of Enforcement. Better than any description, these figures will show the true state of affairs, revealed during the course of the adjudication proceedings, but only if the figures themselves are scrutinised in the light of the developments that occurred prior to these proceedings, and the relevant provisions of the Foreign Exchange Regulation Act, particularly sections 4 (1), 12 (1), 12 (2) and 23 of the Act. Otherwise, the table itself is likely to prove hardly intelligible

Both in the orders, or, at least, in several of them, and in his detailed counter-affidavit on record, the Director of Enforcement has set forth a prologue or synopsis,

of the formulations of policy and the developments, which led to these adjudication proceedings We shall first set forth the substance of this aspect, shorn of superfluous details, and without descending to particular cases We shall then formulate the general issues or propositions *seriatim*, which are included in the scope of our judgments, and after this, we shall pass on to an analysis of these grounds, including a detailed interpretation of section 12 (1) and 12 (2) of the Act which is essential for these cases, and which has certainly occasioned us some difficulty and anxious consideration

The Government of India apparently inaugurated an export promotion scheme, some time prior to these adjudication proceedings, particularly with reference to textiles and handicraft goods Under this scheme, export licences were issued with reference to sale of such goods at Malaya and Singapore, mainly on the basis of the G R. 1 forms and declarations furnished by the exporters to which we shall make detailed reference later. The idea was that these same exporters were to be given the benefit of import of raw materials relevant to their branches of production, on the basis of their export performances, in order to stimulate exports. One fact which emerges crystal-clear and beyond all controversy, from the record, is that such import licences were indeed valuable and even capable of being assigned to others for considerable profit Apparently, the exporters were permitted to export, on the basis of their declarations, and even import licences were issued in advance of the realization of the value of the export. These import licences could either be up to the full declared value of the exports, or up to a formulated percentage thereof. In any event, these proved to be not merely incentives, but a great temptation to exporters or intending exporters A major and indisputable fact, in all these cases, is that the relevant declarations and licences were upon the scale of figures that were heavily *over invoiced*, at the moment, using purely neutral expressions, we may state that these figures did not represent any existing or even remotely probable contracts for sale and purchase at the foreign markets, but were fictitious.

Naturally, in many of these cases, nothing even amounting to a fraction of the *ex facie* export values could be realised or brought home to this country, as repatriated foreign exchange On the contrary, what happened was that, in certain cases, goods to a very small extent were sold, and some foreign exchange was thus obtained and repatriated. In other cases in order to meet the legal obligations of the situation under the Foreign Exchange Regulation Act, the exporters tried to obtain extra foreign exchange by other and surreptitious means but this, as would be obvious to any student of economic trends, proved a self-limiting situation, or a vicious circle. By reason of the very demand for surreptit ous modes of acquiring this extra foreign exchange abroad, the rates in the unauthorised or in official market registered a sharp increase Certain of these developments were revealed to the Directorate, and it was in this situation the directives were issued, for obtaining particulars from the firm concerned

Two further developments are of great importance, at this stage. When these directives were issued for obtaining information or, at least, it became known that such an investigation was a foot, these parties literally threw themselves upon the mercy of the authorities, by not merely invoking, but even earnestly inviting, in many cases, the adjudication of the Directorate under the Act and the Rules This is very clear from the record. It is equally clear from the records that, in many cases, long and full voluntary statements or disclosures were made, of the relevant facts. To charges framed under section 4 (1) of the Act, and under section 12 (2) of the Act, we may take it that pleas of *guilty* were made by the concerned parties or firms, in most of these cases The Director of Enforcement then proceeded to take the relevant facts into consideration, which in his view, included the value of the import licences obtained on the basis of the declaration forms, and levied the penalties in the manner he deemed most appropriate. At least in one case, where it was argued before the Director that the ingredients of section 12 (2) were not established, the Director has brought it necessary to expatriate upon what he deemed to be the true connection, between the *over invoicing* of exports already referred to and the failure to repatriate foreign exchange to the requisite extent which is the

crux of the offence embodied in section 12 (2) of the Act In most of the cases he was content to set forth the prologue, that we have earlier referred to, and to accept and act upon the pleas of guilty. It is, nevertheless, strenuously contended by learned Counsel before us that the Director has altogether failed to exercise his true jurisdiction, which is to discover whether the facts established the substance of the charge under section 12 (2), has misconceived the ingredients of that section, and thereby promulgated orders, which are vitiated by errors apparent on the face of the record, and which are indeed self-contradictory. For this reason, the orders are liable to be struck down in *certiorari* notwithstanding the fact that the parties invoked and invited the adjudication, and the further fact that they pleaded guilty to the charges.

Per contra, to put it very briefly, the learned Advocate-General contends that the orders of the Director ought not, in fairness, to be viewed in a perspective which excludes the situation from which they arose The parties invited adjudication, made voluntary and full disclosures and with full knowledge and consciousness of their acts, pleaded *guilty* to charges under section 4 (1) and section 12 (2) of the Foreign Exchange Regulation Act The entire question of a failure to exercise jurisdiction on the part of the Director or a misconception of the ingredients ought to be considered with this background kept in view Apart from this, the learned Advocate-General contends that the substance of hte charge was made out on the established facts, if, as the Director had every right to do, he ignored the fraudulent contrivances of the parties, euphimistically termed as *over-invoicing,* held them to the consequences of their own declarations Further, the learned Advocate-General has powerfully urged that the writ of *certiorari,* though it is sometimes issued *ex debito justitiae,* is not a writ of course, but is discretionary; certainly, it is not independent of the conduct of the parties, in relation to the very proceeding, who pray for the relief Where that conduct is tainted by fraud, that is, where the parties have come with unclean hands to Court, the Court would have every justification to decline redress. The other aspects are (*i*) whether section 23 (1) is violative of Article 14 of the Constitution, (*ii*) whether the intrusion of extraneous or prejudicial matter has affected the orders of the Director, or the orders themselves indicate a bias in consequence of such intrusion; (*iii*) whether the relevant sections of the Act would justify the imposition of penalties upon a firm as a *legal person,* and (*iv*) whether the existence of alternative remedies, under the statute itself, would preclude the exercise of our jurisdiction, or, at least, render it less expedient in the interests of justice.

At this stage, we may immediately proceed to formulate these issues or grounds, in the shape of certain propositions. As I think that this may be the most desirable way of achieving this purpose, I have included in these formulations, some broad statements about the rival contentions relevant to them.

(*i*) The petitioners not only submitted to this jurisdiction, but actually invited the adjudication by the Director of Enforcement in these cases In most of the cases, there have been pleas of *guilty* to the relevant charges under section 12 (2) of the Act which are the crux of the controversy, since they form the basis of the considerable penalties indicated in the last column of the table. Such pleas have also been made in response to charges under section 4 (1) of the Act in most instances. According to the learned Advocate-General, these facts ought to determine the perspective of our approach to the orders of the Director of Enforcement Learned Counsel for petitioners contend, *per contra,* that these facts cannot extenuate, the alleged failure of the Director to truly exercise his jurisdiction, which is to ascertain whether the ingredients of section 12 (2) were evident from the facts, and the substance of the charge under section 12 (2) was established, irrespective of the pleas of the petitioners.

(*ii*) The interpretation of section 12 (2), in relation to the procedures and the facts, forms the substance of this ground According to the learned Advocate-General, the charge under section 12 (2) was established, and was rightly held to

have been established by the Director of Enforcement. According to learned Counsel for the petitioners, particularly Mr. M. K. Nambiyar, Mr. Govind Swaminathan and Mr. R. M. Seshadri, who made this the main plank of their arguments the Director hopelessly misconceived the true ingredients of the offences. They cannot follow from the facts, which he has accepted in the detailed prologue, since *over invoicing* cannot, by any interpretation, be an offence rendered punishable under section 12 (2). There is thus a failure of jurisdiction, or an error of law apparent on the face of the record. Irrespective of the pleas, the orders are liable to be struck down.

(*iii*) According to the learned Advocate-General, it is very clear that the petitioners have approached the Court with unclean hands, in respect of a discretionary remedy like *certiorari* which is not available *ex debito justitiae*, to a party thus seeking to pollute the very fountains of justice. The maxim *ex turpi causa non oritur actio* applies in this case, and there are ample authorities to support this view. The learned Advocate-General would also place reliance on the other equally well-known maxim, *nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong). According to learned Counsel for the petitioners, these maxims do not apply, since the general moral depraivity of the petitioners is irrelevant, it is only the legal depravity of conduct, in the course of the very proceeding before the Courts of justice, that can act as a bar or obstacle to the issue of the writs, and that does not exist here. Apart from this, the petitioners would be entitled to the writs *ex debito justitiae*.

(*iv*) Section 23 of the Act is sought to be impugned as violative of Article 14 of the Constitution, upon three main grounds. (*a*) It confers an arbitrary unguided and naked power upon the Director of Enforcement, either to choose to impose a penalty in terms of section 23 (1) (*a*), or to institute a complaint in a criminal Court, upon which a conviction by that Court could follow, in terms of section 23 (1) (*b*); there is absolutely no guidance afforded by statute with regard to the exercise of this discrimination. (*b*) Equally under section 23 (1) (*a*) itself, the Director could either impose a penalty; not exceeding three times the value of the foreign exchange involved in the contravention, or Rs. 5,000 whichever is more. Mr. K. Srinivasan, in particular, has stressed that this is left as an unascertained maximum, with no statutory guidance with regard to the fixation of the penalty, the provision is, therefore, violative of Article 14 of the Constitution. (*c*) It has been argued by Mr. R. M. Seshadri that the exercise of the discretion by the Director of Enforcement, in the different cases, amounts to a violation of Article 14, because there is no discernible and consistent basis of differentiation. Also, the value of the import licences should not at all have intruded, as a factor of consideration, in levying the penalties.

(*v*) The orders of the Director are vitiated by the intrusion of irrelevant matter, and by an evident cloud of prejudice arising from such intrusion. Terms have been used by the Director in his order, which are strong expressions, and which ought not to be used by a quasi-judicial authority exercising powers under the Act; they reveal the bias or prejudice, and the orders are liable to be struck down for this reason also. This point was urged elaborately by Mr. R. M. Seshadri, in particular, with the support of certain decisions, to which we shall later refer.

(*vi*) The existence of alternative remedies under the Act has been canvassed during arguments. It is urged for the petitioners that the alternative remedy is onerous, since it requires the full deposit of the penalty, before the appeal can even be heard, and that where the alternative remedy is thus a very heavy burden on the party seeking relief, its mere existence would be no bar to the exercise of writ jurisdiction.

(*vii*) The question whether, in certain of these cases, a firm can be penalised as a *person* has been canvassed by Mr. Srinivasan who has also sought to argue, with reference to his party, that the offence under section 4 (1) is not made out, on the facts, and the true interpretation of that section, this is special to his case, though in other cases this was not adverted to.

We shall proceed to consider *seriatim* these grounds, and in dealing with the second ground, a somewhat elaborate analysis of the procedure and the terms of section 12 (2) will be necessary. In a very real sense, the true interpretation of section 12 (2), in relation to the facts of these proceedings, forms the crux of the petitions, as argued before us Similarly detailed treatment is necessary with regard to the plea of the learned Advocate-General that the petitioners, having approached this Court for redress with unclean hands, are not entitled at all to the issue of the writ of *certiorari*.

With regard to the matter of jurisdiction, the learned Advocate-General has placed considerable reliance upon *Rex* v. *Williams, Philips, Ex parte*[1]. In that case, in the light of the requirement of the law that a person following a particular profession, and accused of an offence, could challenge the participation in the proceedings by any Justice of the Peace of the same avocation in the private life, argument was advanced that one of the Justices of the Peace was disqualified, because he was also a baker, like the delinquent. On the petition of the party affected, the High Court declined relief, holding that this point ought to have been advanced before the Bench, and that since the party failed to do so, he could not later claim the writ *ex debito justitiae* In *M/s G M T. Society* v. *Shri Kasbekar*[2], the principle has been reaffirmed that, before the question of jurisdiction is raised on a petition, the objection to jurisdiction must be taken before the Tribunal, whose order was sought to be challenged Another case of interest is *M/s. S. N Transport Co.* v. *State Transport Authority*[3], where the objection related to a ground of extraneous consideration, which was not actually taken before the appellate sub-committee, the petitioner was held precluded Reference may also be made to *Harihar Tiwari* v. *State*[4], and *V. M S Md. & Co.* v *State of Madras*[5] In *Regina* v *The South Holland Drainage Committee Men, Ex parte*[6], an applicant for *certiorari* was held precluded by his prior conduct that, in the dispute respecting the very land, he had not mentioned the interest of his wife, or the nature of the tenure, at the earliest stage.

Equally with regard to the plea of *guilty* advanced by these parties, who may be expected to possess the requisite degree of wordly knowledge and consciousness of the substance of the charge levelled against them, it is argued that the orders of the Director ought not to be minutely dissected and criticised, without reference to the basic fact that these pleas were made. *Per contra*, it is argued that a plea of guilty is never with reference to the formal semblance of the charge, but with reference to its substance. For instance, even if the plea is there, if the substance has been mis-conceived or the ingredients are patently lacking, a party cannot be punished on his plea alone, and Courts of appeal will not uphold this This is a familiar phenomenon in criminal jurisprudence, in particular; a man may plead guilty *to* a charge of murder, but his conviction therefor will not be upheld, if the facts established that he is guilty only of the lesser offence of culpable homicide not amounting to murder. Here, we think that the true answer is that both the invitations to adjudication, which appear to have been earnestly made in these cases, and the actual pleas, will necessarily have to be kept in mind by this Court, in interpreting the orders of the Director of Enforcement, and in considering whether he misconceived his jurisdiction, or the ingredients of the law But these grounds are not *any absolute bar to a party seeking redress*, if he can otherwise show that he is entitled to the issue of the writ *ex debito justitiae*, because the order is vitiated by any evident and fundamental error of law, or by any patent misdirection

The second ground involves the entire question of the procedure that has to be followed in these cases. Upon the phraseology of section 12 (2), in particular, which has occasioned us real difficulty, we are indebted to Sri V. K Thiruvenkatachari for drawing our attention to an explanatory passage in Foreign Exchanges 1963 edition) by Norman Crump, and also to passages, in Halsbury's Laws of

1. L.R (1914) 1 K.B 608.
2. I L R (1934) Bom 247
3. A I R 1957 Cal 638
4. I.L.R (1953) All. 855.
5. (1952) 2 M L J. 598 A I.R 1953 Mad. 195.
6. (1838) 8 L J. Q B 64.

England (Simonds edition) Volume 28, pages 123 and 127 As the latter source clearly shows, the law in the United Kingdom is that

". . . . . no person resident in the United Kingdom, who is entitled to sell or procure the sale or procure the importation, must, without treasury permission, do or refrain from doing any act with the intent to secure that the sale or importation, as the case may be, shall be delayed to an extent which is unreasonable having regard to the ordinary course of trade, or that payment for the sale shall not be made in the manner indicated by the condition or statement."

The effect of this phraseology upon the term of our own section 12 (2) of the Foreign Exchange Regulation Act, is self-evident, and need not be further, stressed However that might be, it is clear enough that section 12 (2) is explicable, only in terms of the actual procedure that prevails, in respect of the obtaining of export licences and the fulfilment of legal obligations by the exporter, whether he be the actual seller of the goods or a consignor, with regard to securing that the sale itself is effected with reasonable expedition, and that the concerned foreign exchange is duly repatriated. Before dealing with the procedure, it may be convenient, in this context, to set out this vital part of the Foreign Exchange Regulation Act and no apology is needed for this, as it is the interpretation of this part of the Act, which has involved the greatest debate We are hence, hereby extracting *verbatim*, section 12 (1) of the Act, section 12 (2) of the Act, section 12 (3) of the Act, and, omitting section 12 (4) which may not be very relevant, section 12 (5) and section 12 (6) of the Act. Following this, we are setting forth section 23 (1) sub-clauses (*a*) and (*b*) section 23 (2), section 23 (3) (*a*), section 23 (*c*) (in entirety and section 23 (*d*) (1), all of which are relevant in the discussion We are further extracting rule 6 of the Foreign Exchange Regulation Rules, 1952, dated 22nd April, 1952.

"12. (1) The Central Government may by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India, directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner.

(2) Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that—

(*a*) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(*b*) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid:

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

(NOTE —The amendment introduced to section 12 (2) by Act LV of 1964, with effect from 1st April, 1965, admittedly is not applicable to the present cases.)

(3) Where in relation to any such goods, the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expedient for the purpose of securing the sale of the goods and payment therefor as aforesaid, and without

prejudice to the generality of the foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

* * * *

(5) Where in relation to any such goods, the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of th se goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods

(6) For the purpose of ensuring compliance with the provisions of this section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

" 23. (1) If any person contravenes the provisions of section 4, section 5, section 9, section 10, sub-section (2) of section 12, section 17, section 18-A or section 18-B or of any rule, direction or order made thereunder, he shall—

(*a*) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(*b*) upon conviction by a Court, be punishable, with imprisonment for a term which may extend to two years, or with fine, or with both.

* * * *

(2) Notwithstanding anything contained in section 32 of the Code of Criminal Procedure (V of 1898), it shall be lawful for any Magistrate of the First Class, specially empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(*a*) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement . . "

* * * *

" 23-C (1) If the person committing a contravention is a company every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly .

Provided that nothing contained in this sub-section shall render any such person liable to punishment, if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention under this Act has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, —

(*a*) ' company ' means any body corporate and includes a firm or other association of individuals and

(*b*) ' director ' in relation to a firm, means a partner in the firm

23-D (1) For the purpose of adjudging under clause (*a*) of sub-section (1) of section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an enquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of the said section 23 .

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall instead of imposing any penalty himself, make a complaint in writing to the Court."

" *Rule* 6. *Period within which export value of goods is to be paid*—The amount representing the full export value of goods exported shall be received from the country of final destination of the goods, unless permitted otherwise by the Reserve Bank in its discretion, and shall be paid to the exporter within six months from the date of shipment of the goods

Provided that in the case of goods exported to Pakistan or Afganistan, the amount representing the export value shall be received within three months from the date of export :

Provided further that the Reserve Bank, in its discretion, may, for sufficient and reasonable cause shown, extend the said period of six months or three months, as the case may be "

The procedure is that the intending exporter applies in the G R 1 Form, which is of great importance for a true understanding of the terms of section 12 (2) of the Act. The following particulars are relevant He states

"I hereby declare that I am the *seller/consignor* of the goods in respect of which this declaration is made and that the particulars given above are true and

(*a*) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer.

(*b*) that this is a fair valuation of the goods which are unsold "

The record makes it very clear that where he applies as the seller, which is the relevant fact in these instances, he furnishes certificate (*a*) in the above form, and strikes out certificate (*b*). It is only if he is a mere consignor, that he strikes out certificate (*a*) and furnishes certificate (*b*) He also undertakes to deliver to the bank foreign exchange resulting from the export of the goods, on or before the specified date, and the directions in the form, render these matters very clear In page 4 of the form, there is a certificate by the authorised dealer, usually a reputed bank, to the effect that they have received for collection the requisite bills, and also the *letter of undertaking* specified in the second clause of this certificate Rule 6 which we have earlier extracted, applies to determine the specified date within which the amount representing the full export value of the goods has to be received from the country of final destination, and paid to the exporter

In the light of these procedures and this practice, the intendment of the Legislature in enacting section 12 (2) becomes clear. There are, of course, difficulties of interpretation For instance, the obligations embodied in section 12 (2) may relate, depending on the interpretation, either to the seller of the exported goods, or to a were consignor or to both The relevant certificates in the G R 1 Form, and the direction to strike out the certificate not appropriate, however, make this matter

clear. The prescribed procedure and the certificates in the declaration, throw a flood of light on the terminology of section 12 (2), and in our view, clearly prove that the legal obligations of section 12 (2) attach themselves either to the seller or to the consignor, not necessarily only to the consignor, but, of course, *where any export of goods has been made* An argument was sought to be advanced by Sri R.M. Seshadri, at one stage, that property in the goods may pass to the buyer the moment the goods are put on board, and hence that the words *no person entitled to sell or procure the sale of the said goods* occurring in section 12 (2), will no longer apply once this stage in the transactions has been reached thereafter, at least, no action or inaction on the part of the seller, can render him liable for a charge under section 12 (2). But, obviously, this depends, partly at least, on the further question whether the contracts are *c.i f.* contracts or *f o b.* contracts; the incidents of these contracts were explained by Cotton, L.J., in *Mirabita* v *Imperial Ottoman Bank*[1]. The learned Advocate-General has been at some pains to gather the authorities on this aspect, and, in particular, he has placed before us the decision in *Smyth & Co* v. *Bailey & Co*[2], *Income-tax Commissioner* v. *P M. Rathod & Co.*[3], and *B. K Wadeyar* v *Messrs. Daulatram Rameshwar-Lal*[4]. Our conclusion, on this aspect, must be that there can be no rigid line of demarcation in this respect; since such commercial contracts are of two broad categories, every thing would depend upon the particular terms, whether the property does or does not pass to the buyer, when the goods are placed on board the vessel for export.

Certain inferences, however, would appear to be fairly clear. The words *no person entitled to sell, or procure the sale of the said goods*, are clearly descriptive; they refer to the person in the capacity of the seller of the goods, or to a person entitled to procure the sale of the same, after the export of the goods has been made. But this does not necessarily imply, as far as we can gather, that the export must only be to a nominee of the consignor at the other end. On the contrary, any such interpretation would render meaningless the certificate in the G R 1 Form furnished in these cases, that not only is the invoice value declared as the full export value of the goods, but that it is the same as *that contracted with the buyer* Any person in this situation has two legal obligations He must see that the sale of the goods is not delayed to an unreasonable extent He must further see that payment for the goods is made in the prescribed manner representing the *full amount payable by the foreign buyer in respect of goods*, and also that such payment is not unduly delayed.

The crux of the present argument by learned Counsel for the writ petitioners really arises from the terminology employed by the Director, both in the charges themselves and in his final proceedings The Director repeatedly states that the concerned parties failed to repatriate the foreign exchange representing *the full expert value of the goods;* That is the charge to which the pleas of *guilty* have been made Learned Counsel for the writ petitioners have rightly emphasised that, though the *full export value of the goods may very* frequently be equivalent to the *full amount payable by the foreign buyer in respect of the goods*, the words occurring in section 12 (2) (*b*), the two may conceivably vary, owing to a variety of circumstances, not all of them within the control of the seller For instance the rates of foreign exchange themselves may be adversely affected between the dates when the contracts were made with the foreign buyer, and the dates with reference to which the foreign buyer incurs the obligation to pay the value, interpreting this in terms of Indian currency. Again, section 12 (5), that we have earlier extracted, shows that the Reserve Bank has the power to require the person holding the shipping documents to retain possession of them until the exporter makes arrangements, for the Reserve Bank to receive or procure, an amount which represents in the opinion of the Reserve Bank the full export value of the goods; in other words, this is a check on what is known as

1 (1878) 3 Ex D 164
2 (1940) 3 All E R 60 (H L)
3 (1960) S C J 153 (1960) 1 S C R 401 A I R 1959 S C 1394
4 (1961) 1 S C R 924 : (1963) 1 S C J 550 A I R 1961 S C 311

under-invoicing It is, therefore, strenuously contended that the Director did not at all address himself to the true question, whether these parties really failed to repatriate the exchange value, of the *full amount payable by the foreign buyer* On the very facts of *over-invoicing* found by the Director it is argued that there were no such amounts at all ; the amounts payable were only with regard to goods actually sold, and they represented only a fraction of the originally declared, *full export value* They were repatriated, at least in some cases, and hence the orders have to be set aside.

This, I think, confuses two distinct arguments. On a question of interpretation, it seems clear that, in the light of the certificate furnished in the G R 1 Form, the *full export value* would certainly be *the full amount payable by the foreign buyer*, except, indeed, where other circumstances, such as an adverse rate of exchange, have affected the liabilities of the foreign buyer. If such circumstances were germane to the present issues, it must certainly be held that the Director has failed to address himself to the proper question, or to the establishment of the proper ingredients But, in all these cases, solemn certificates were furnished by these parties, not merely to the effect that a particular amount was *the full export value* but also specifically that this represented the bargain or contract with the foreign buyer The argument now is not that the two have varied, owing to other supervening causes The argument based upon *under-invoicing* relevant to section 12 (5), again seems to be a quite distinct matter, and such a power of control may be vested with the Reserve Bank But that does not affect the legal obligations of the party, in the position of the consignor or seller, with regard to section 12 (2) (*a*) or section 12 (2) (*b*) Where this party fails to repatriate the foreign exchange, which would ordinarily be *the full export value*, it may certainly be considered whether the *full amount payable by the foreign buyer* is a different sum owing to some circumstance for which the party is not responsible, and the party has, therefore, to be exonerated ; or at least, to be dealt with only with regard to the later sum But, where it has been declared that there is a foreign buyer liable to pay this sum, the question is not this, but whether the Director will not be justified in holding the party to his word or assurance and in requiring him to repatriate the *full amount payable by the foreign buyer*, which is the same as the *full export value of the goods* On a matter of interpretation, there can be no possible difficulty. The two descriptive terms are not precisely equivalent, and they may vary. But the mere fact that the Director uses the wrong terminology, certainly cannot cloud or affect the main issue. That is, whether, on the facts, these parties did not fail to repatriate foreign exchange representing *the full amount payable by the foreign buyer* They declared this to be a particular amount, and they failed, in most cases, to repatriate the foreign exchange, even to a fraction of this amount ; can they be permitted to plead their own fraudulent contrivances in *over-invoicing*, as a justification for this Court, and as an answer to the charge ?

This line of reasoning will apply, with equal force, to the other argument that the Director has failed to exercise his true jurisdiction Certainly, the Director was not concerned with *over-invoicing* at all, in the context of the charge under section 12 (2) of the Act He has referred to these facts, in the prologue or preliminary discussion, and, apparently, he believes the statements of voluntary disclosure, and thinks that these events did occur. But, it would be doing him an injustice to presume that he was not aware that the failure to repatriate the foreign exchange representing the *full amount payable by the foreign buyer*, is quite distinct from the obtaining of export and import licences by fictitious figures declared, which is *over-invoicing*. Irrefutable evidence to this effect can be found in one of the cases argued by Sri R M. Seshadri, where learned Counsel appeared before the Director, and pressed the argument that the offence under section 12 (2) was quite distinct from *over-invoicing* and, indeed, that the two were not particularly reconcilable. The Director then stated in his order as follows :

"It was however argued by Shri R M. Seshadri, Advocate, that mere over-invoicing by itself is not punishable under section 12 (2) of the Foreign Exchange

Regulation Act and that the mere inability of an exporter to repatriate the full export proceeds without any violation or omission on his part would not constitute an offence.

In my opinion the above arguments are untenable. For one thing the charge in this case is not for mere over-invoicing on exports but is one under section 12 (2) which does not refer to any over-invoicing at all Under section 12 (2) (*a*) (as it stood before 30th December, 1964) an exporter should not do or refrain from doing any act with intent to secure that the sale of the goods is unreasonably delayed, or the payment of the goods does not represent the full amount payable by the foreign buyer in respect of the goods In this particular case, there is clear admission of the party (exporter) that the valuation given in the G R. 1 Forms did not represent the correct or real value of the goods, and that the outstanding was the direct result of deliberate over-invoicing, which was intentionally done for the purposes of securing import entitlement from the Government, on the basis of the over-invoiced exports . obviously, the exporter cannot take advantage of his own fraud or wrong and plead that no amount is repatriable . '

Sri K Srinivasan contended on the facts of his cases that section 12 (2) (*a*) alone is applicable to consignment sales, and that section 12 (2) (*b*) cannot apply to consignment sales, but only to sales with the *ex facie* record relating to the obligations undertaken by a foreign buyer. But he himself admits that, in the relevant G R. 1 Form, his clients have retained the first part of the declaration or certificate, which is explicitly to the effect that the invoice value is *the same as that contracted with the buyer*. After this, it is difficult to see how it is open to the parties to plead that there is no foreign buyer, and that they were merely consigning to their own nominees abroad, who might or might not be later able to market the goods in the foreign market. Another point advanced is that rule 6, earlier extracted, is only a rule under section 12 (1), and not a rule under section 12 (2), whereas section 23 (1) (*a*) enables the imposition of penalties only for contravention of section 12 (2) or the Rules made thereunder Rules have been made under the delegation of power embodied in section 27 of the Act, and they can validly apply to all obligations in the main statute itself The argument cannot be sustained that, for this reason, rule 6 could not be invoked in these cases

The main argument has, throughout, been this When the Director tacitly accepts *over-invoicing* in his narrative of the prior events, it is claimed that there is a manifest inconsistency between this, and his finding that the offence under section 12 (2) has been established But the true answer to this is that, in the one instance where the Director had justification for considering this argument, since other instances were covered by pleas admitting the guilt, he makes it clear that he is aware of this distinction But he holds the parties, in effect, to their assurance in the relevant certificates In terms of these assurances, though the terminology might have been erroneous in one or other context, what he finds is that these persons manifestly failed to repatriate the foreign exchange representing the *full amount payable by the foreign buyer*, which has to be taken in the light of the certificates as identical with the *full export value*. In the light of this interpretation section 12 (2) itself becomes clear, and we are unable to see that the order is vitiated by any failure to exercise jurisdiction in the proper manner, or any error of law apparent on the face of the record It has to be reiterated that the orders have to be construed in the situations in which they were made, the parties having invited the adjudication, and deliberately pleaded *guilty* to the charges under section 12 (2) of the Act Even if there be a formal defect in the charge, in the light of those facts, the Court will clearly be justified in declining to exercise its jurisdiction under Article 226 of the Constitution

We now come to the ground relating to turpitude Here, it seems to me that the matter is clear beyond all doubt The nature of the writ of *certiorari* has been considered in several authorities, and perhaps it is sufficient to refer to the decision of Ramachandra Ayyar, J , (as he then was) in *Issardas* v *Collector of Madras*[1] Undoub-

1 (1959) 2 M L J 136 (1959) M L J (Crl) 601 A I R 1959 Mad 528

tedly, the writ of *certiorari* is issued at the discretion of the superior Court and is ordinarily not a writ of right, except in the United Kingdom, where the situation is different when the Attorney-General prays for the issue of this prerogative writ. But the law has been stated in Halsbury's Laws of England, Volume XI (Simonds edition), page 140, in the form that the writ issues *ex debito justitiae*, though it is discretionary,

"......Where it is shown that the Court below has acted without jurisdiction, or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief . . ."

Obviously, here the metaphor of *clean hands is* essential and pertinent. If in relation to the proceedings a party approaches this Court for the issue of a writ of *certiorari* with a record of depravity of conduct intrinsic to the very proceedings, the Court has every right and, indeed, the duty to decline him relief

Mr. Nambiyar has referred to the observations of Crutton, L. J, in *Rex* v. *Secretary of State for Home Affairs O'Brien* Ex parte[1], at page 382 to the effect.

"A man undoubtedly guilty of murder, must yet be released if due forms of law have not been followed in his conviction."

The argument is that it is legal depravity alone that will so disentitle a man; not moral depravity, even if it be with regard to the proceeding at the prior stage of events. The decision in *Rex* v. *Kensington, Income-tax Commissioners, Ex parte De Polignac (Princess Edmond)*[2] is heavily relied upon Where a party deliberately abstains from stating facts, which are pertinent, in the very proceedings, the principle of *uberrima fides* is contravened, and the Court will not grant relief, this is intrinsic legal depravity. But a number of decisions have been cited in support of the proposition that this category of conduct alone will disentitle petitioner and that the maxim *Ex turpi Causa non oritur actio* will have no application to other cases though the Court might well recoil from the previous admitted conduct of the party at a prior stage of the history of the case I think it will be sufficient to cite the authorities here: *U. C Rekhi* v *The Income-tax Officer*[3] *Ratan Chandra* v *Adhar Biswas,*[4] *Kaboolchand* v *Deputy Custodian*[5] *Deptylal* v. *Collector of Nilgiris*[6], *Marappa Gounder* v. *Central R T Board*[7], *Manibhai Hathibai* v *C W. E. Arbuthnot*[8], *Hindustan Motors Ltd.* v *Union of India*[9] and *Baldev Singh* v. *Government of Pepsu*[10].

But, as the learned Advocate-General contends, I think with great force and plausibility, on the facts of the present matter, the case is very strong against the petitioners In a recent decision of the Supreme Court, *Public Passenger Service Ltd.* v. *M. A Khadar*[11], their Lordships have expressed the principle thus at page 492:

"..........the maxim (*Ex turpi causa non oritur actio*) does not mean that every improper conduct of the applicant disentitles him to equitable relief. The maxim may be invoked where the conduct complained of is unfair and unjust in relation to the subject-matter of the litigation, and the equiry sued for."

It appears to us that this test is precisely fulfilled in the present cases It is only by giving recognition to the fraudulent contrivances as *over-invoicing*, resorted to by these petitioners, and, indeed, by basing our action of relief on the fraud, that we are in a situation to strike down these orders, because the ingredients of

1 L R (1923) 2 K B 361.
2 L R (1917) 1 K B 486.
3 A I R 1951 Simla 1
4 A I R 1952 Cal 72
5 A I R 1952 Raj 146
6 (1959) 2 M L J 208: A.I R 1959 Mad 460
7. (1956) 1 M L J. 324.
8 A I R 1947 Bom 413
9. A I R 1954 Cal 151
10 A I R 1954 Pepsu 98
11 (1966) 1 S C J 68 (1966) 1 Comp L J 1: (1966) 1 M L J (S C) 23 (1966) 1 An W R (S C) 23 · (1966) 1 S C R 683 · A I R 1966 S C 489

section 12 (2) were not *prima facie* established This fraud is intrinsic to the very proceeding, and the defence itself is based upon the fraud and the false declarations; without recognising the fraud and the falsity of the declarations, the petitioners will have to be held to their certificates, and the failure to repatriate the foreign exchange in terms of the declared value, which is also the full value payable by the foreign buyer, is incontrovertible. The learned Advocate-General has referred to the following authorities in this connection: (i) Snell's *Principles of Equity* (*Twenty fifth edition*) *pages* 30-31, where it is, however, declared that the maxim need not be taken too widely, and that " . . .it does not mean that a plaintiff in a Court of Equity will fail unless he has led a blameless life " (ii) *Extract from Administrative Law*, by *H. W R Wade* (1961, edition at page 161, (iii) Broome's *Legal Maxims* (*Tenth edition*) *page* 238, *Nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong). (iv) *Modern Equity—The Principles of Equity*, by Greville Hanbury (*Eighth edition*), *page* 121, (v) *A M. Allison* v. *B L Sen*[1], (vi) *Public Passenger Service Ltd.* v *M. A Khadar*[2], (vii) *Abdul Shakoor* v. *R C & E Officer*[3], where the learned Judge has quoted the dicta of *Wilmot, C. J* in *Collins* v. *Blantern*[4], to the effect " no polluted hand shall touch the pure fountains of justice." (viii) *Co-operative Marketing Society* v *Sriramulu*[5], (ix) *In re Lush's Trusts*,[6] (x) *Gill* v. *Lewis*[7], (xi) Ex parte *Fry*[8]. The last is a case of great interest, where punishment was inflicted on a member of the fire service for alleged indiscipline, and relief was declined on the ground that the conduct of the concerned officer did not merit the grant of the relief, apart from the substance of his contentions on the law.

On a careful consideration of this aspect of the case I think it is clear that there were two kinds of bars in equity, if I may so term it, with regard to a relief, by way of issue of writ of *certiorari*, which does not issue *ex debito justitiae*, except within the well-recognised limits of the law. One bar certainly is that the party is disentitled by his depravity of conduct in the very proceeding, such as the filing of a false affidavit, or any other conduct which might be characterised as a resort to the Court of justice with unclean hands, pertinent to his conduct of the cause itself. That principle has been recognised in the decisions cited by *Mr M K Nambiar*, including *Rex* v. *Kensington, Income-tax Commissioners*, Ex parte de Polignac *Princes Edmond*[9]. But this category is not necessarily exhaustive Equally, a party cannot pray to the Court for relief, based on the recognition of his own fraud or fraudulent contrivances, the substance of his defence being that the recognition of this fraud will preclude the application of some other provisions of law to his case, in these instances, section 12 (2) of the Foreign Exhange Regulation Act This is also depravity arising out of the very *lis*, and not at all irrelevant thereto, or merely some extraneous immorality of conduct In all these cases, on this ground alone, the Court would be justified in declining the relief This must be the general conclusion, but of course, it may be subject to orders to a different effect in individual instances, where the facts may be such that there is no order at all in law, owing to a mistake of fact, or on allied considerations.

I shall next deal with the aspects relevant to Article 14 of the Constitution, in its impact upon section 23 (1) of the Act, as the arguments were presented by Messrs R. M Seshadri and K. Srinivasan who particularly dealt with this aspect. Mr R M Seshadri has relied on several decisions, both for the general principle that the statute itself exhibits no rational basis for a possible hostile discrimination, and in support of his contention that the Director failed to exercise a quasi judicial discretion in awarding the penalties With regard to the latter aspect, the decisions, cited are (i) *Collector of Customs* v *Gokuldas*[10], (ii) *Sha Rikabdoss Bhavarlal* v. *Collector of*

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1 (1957) S C J 268 (1957) M L J (Crl) 175 A I R 1957 S C 227, 231

2 (1966) 1 S C J 68 (1966) 1 M L J (S C) 23 (1966) 1 An W R (S C) 23 A I R 1966 S C 489

3 A I R 1959 All 440, 452

4 95 E.R. 847

5 (1960) 1 An W R 57, 62

6 (1869) Ch App 591

7 (1956) 1 All E R 844, 852

8 (1954) 2 All E R 118, 122

9 (1917) 1 K B 486

10 I L R (1955) Mad 1248 : (1955) 1 M L J. 422, 438.

Customs[1], (*iii*) Implications of certain observations of their Lordships of the Supreme Court in *M/s. Ramchand Jagdishchand* v. *Union of India*[2] With regard to the mode of proof of an inequality pertaining to Article 14, *M/s Pannalal Binjraj* v *Union of India*[3], particularly paragraphs 30 and 31 has been cited, as well as *P. J Irani* v *State of Madras*[4] We think it is sufficient to observe, as stressed by the learned Advocate-General that, upon the general impact of Article 14, this very matter was considered with respect to section 23 (1) (*a*) of this Act is *Shanti Prasad* v *Director of Enforcement*[5], and that the argument was repelled That was, no doubt, not upon the present reasoning in its precise form, but the section was certainly examined, and held not to offend Article 14. Indeed, it is difficult to see how the section offends Article 14, in the sense of a statutory discrimination without a reasonable classification or basis It is true that under section 23 (3) (*a*) a Court cannot take cogniznace of an offence punishable under section 23 (1), except on a complaint in writing by the Director of Enforcement. But the Director is not left without any statutory guidance in respect of the exercise of his discretion, whether to act under section 23 (1)(*a*) or to resort to a compl int to Court, which may ultimately le d to a conviction under section 23 1 (*b*) Under section 23 (*d*) (1) proviso, the Director is to have regard, with reference to its scope, to the *circumstances of the case* and the fact that the penalty, which he is empowered to impose *would not be adequate* Sri K Srinivasan has argued that this refers to another category of cases, and not to cases where *ab initio* the Director desires to make a complaint However, that might be, the statute itself furnishes the guidance and we are, hence, quite unable to hold that section 23 (1) (*a*) *per se* offends Article 14 of the Constitution

The next argument is that advanced by Mr Srinivasan that section 23 (1) (*a*) is violative of the Article 14, because it furnishes no basis for the Director to exercise the quasi-judicial discretion between the minimum of Rs 5,000 and an unascertained maximum. As observed by the Supreme Court in *F N. Roy* v *Collector of Customs*[6], the discretion is certainly not uncontrolled or unreasonable There are statutory appeals provided including an appeal on a point of law to this Court, and the imposition of the fine is a quasi-judicial act, the test of the quantum must clearly be in the gravity of the offence.

The learned Advocate-General rightly contends, with regard to the other argument of Mr Seshadri that the penalties imposed in these cases infringe Article 14, that the normal approach must be that the authority did not act *with an evil eye or unequal hand* Reference may be made here to *Sunday Lake Iron Co* v *Wakefield*[7], *Snowden* v *Hughes*[8] and *Kailash Agencies* v *Collector of Customs*[9] Certainty, as stressed by Mr Seshadri, on the authority of paragraph 30 in *Pannalal's case*,[10] the presumption that the authority does not act *with an evil eye or unequal hand*, cannot be stretched too far But this kind of discriminatory treatment, to justify our inference, must be clearly established on the facts and strictly proved We cannot deal with it as a general argument, except to hold that we are unable to see any justification for conceding it as such, applicable to the generality of these proceedings A particular instance, in which this has been established to have occurred, is, of course, a different matter

We shall next deal with the argument relating to the intrusion of extraneous facts or matter in the orders of the Director, and to a cloud of bias said to have been thereby occasioned It is pointed out by learned Counsel that certain terms and expressions used by the Director betray this I do not think it is necessary to recapitulate them here. It is urged that these words are perjorative and that such evidence of bias, in a quasi-judicial authority, must not be tolerated Mr Seshadri has

1 (1961) 2 M L J 443 (1961) M L J (Crl) 675 I L R (1962) Mad 229, 234
2 (1962) 2 S C J 189 (1962) 3 S C R 72 A I R 1963 S C 563, 569
3 (1957) S C R 233 A I R 1957 S C 397
4 (1962) 1 An W R (S C) 92 (1962) 1 M L J (S C) 92 (1962) 1 S C J 194 (1962) 2 S C R. 169 A I R 1961 S C 1731
5 A I R 1962 S C 1764, 1768
6 (1957) S C J 734 (1957) M L J (Crl) 684 A I R 1957 S C 648, 651
7 62 L ed 1154
8 88 L Ed 497
9 A I R 1965 Punj 305
10 A I R 1957 S C 397

relied upon the following decisions (i) *Dhirajlal* v. *Income-tax Commissioner, Bombay*[1], (ii) *Swami Motor Transport Ltd* v *Raman and Raman Ltd*[2], (iii) *Mohta & Co.* v. *Viswanatha Sastri*[3] There is, here, one important fact stressed by the learned Advocate-General, which must be held to be practically conclusive. Certainly, of the facts set forth by the Director as a prologue to his proceedings, some are likely to prejudice any Tribunal against the concerned parties; they relate to fraudulent contrivances, which Courts will certainly not countenance notwithstanding an argument of Mr Srinivasan that we may notice here, for this purpose, that the misconceived or illadvised export promotion scheme of the Government, itself virtually forced the parties to *over-invoicing*. But the learned Advocate-General stresses that, apart from some objective events, such as proceedings initiated or investigations conducted on certain dates, the rest of this narrative is really culled from facts disclosed in the statements of the parties, those were the sources which the Director has drawn upon and, even now, the parties do not claim that their statements could not have been acted upon Where, the extraneous matter, so-called, truly relates to statements made by parties in the very proceedings, which are relevant material, we do not see how this argument of intrusion of prejudicial matter can be sustained It may be that, here and there, the Director has used somewhat strong expressions, they represent his reactions to the disclosures, and cannot be termed unnatural, though it may be claimed that he should have been more careful, and that he should have used more neutral terms. However that might be, such facts, as the procurement of import licences on the basis of fictitious declarations and possible profits from those licences (whether directly or by assignment-sales) have been, mainly taken by the Director into consideration, with regard to the penalties to be imposed in these cases Surely, those facts are not irrelevant for that purpose, though *over invoicing per se* is not the offence punishable under section 12 (2) at all We are unable to see how, on this ground, the orders are liable to be struck down.

I shall now very briefly deal with the existence of alternative remedies under the statute, which, again, appears to me to be a very pertinent consideration. Section 23-E provides for Appeals, and it is difficult to see how the existence of such remedies can be ignored by this Court, merely because the Appellate Board can entertain the appeal only if the deposit is made, or at the highest for the party, if the deposit is actually made before the hearing of the appeal is taken up. These may be hard terms, but the Legislature has deliberately enacted them, as part of the statutory procedure for appeals, which are themselves creatures of statute, in *Sales Tax Officer* v *Shiv Ratan*[4], it was held that merely because such deposit has to be made, the assessee cannot by-pass the statutory remedies. There is a further, appeal to this Court on any question of law, under section 23-EE of the Act These are relevant considerations, though the Court certainly do have the power, which may be said to be a power reserved in this Court to interfere, by way of writ even where there are specific alternative remedies, and they have not been pursued. In the present case, it is represented that, in some instances at least, appeals may be in the process of institution.

Finally, we shall deal with the arguments of Mr K Srinivasan, though they would not appear to be of a general character In most of these cases, the conviction under section 4 (1) of the Act has not been canvassed before us. But Mr. Srinivasan argues that section 4 (1) has to be read with section 2 (*d*), defining *Foreign Exchange*, and that it cannot be said that the petitioners, in their cases, purchased or otherwise acquired foreign currency Mr. Srinivasan has relied on a case in the United Kingdom *H P C Productions Ltd In re*[5] But it is very pertinent to note that the terms of that Act (Exchange Control Act, 1947) were more restricted, and certainly not any exact replica of the terms of section 4 (1) of the Act under considera-

1 AIR 1955 SC 271, 273
2 (1961) 2 MLJ 127 : ILR (1961) Mad 110
3 (1954) SCJ 611 AIR 1954 SC 545
4 (1966) 2 SCJ 161 : (1965) 3 SCR 71 : AIR 1966 SC 142
5 (1962) 2 WLR 51.

tion. The terms of section 4 (1) are wider, and presumably, deliberately made so. It is difficult to follow the argument that these persons did not acquire *foreign currency*, though the *modus operandi* may have been such that, finally Indian rupees alone came into this country. It is the nominee or the agent who appears to have obtained the foreign currency for the concerned petitioners, and converted the foreign currency into Indian currency But even this may well fall within the ambit of section 4 (1) of the Act.

Concerning the last point, that the word *person* may not include a firm at all, the matter would appear to be concluded by the definition of that word in section 3 (42) of the General Clauses Act. Indeed, it was not argued in any of the other cases that a firm was not a *person* and was not liable as such; the argument was the other way round, that the liability of partners, who were not directly concerned, should have been carefully scrutinised, within the scope of section 23-C of the Act. But this is a matter to be dealt with, upon individual petitions.

We would, therefore, find these grounds accordingly. Individual proceedings should be posted before us for disposal, in the light of these findings, and after copies of these judgments are made available to the learned Advocate-General and learned Counsel concerned

Natesan, J.—While I am in respectful agreement with my Lord the Chief Justice in his conclusions in the judgment just now delivered, which I had the privilege of reading in advance, having regard to the importance of the questions raised and the learned arguments we heard for several days, I am expressing my views on certain aspects of the matter under controversy in my own words Shorn of details and refinements which may have to be considered at a later stage when each case is taken up for consideration on its merits, as typical of the cases which give rise to the questions considered by me I shall take up the broad facts of Writ Petition No. 3651 of 1965 as basis for the discussion. The applicants, a partnership firm consisting of six persons, had admittedly taken advantage of loopholes for fraud and malpractice in the export promotion scheme introduced by the Central Government to secure much needed foreign exchange and profited themselves considerably from the import licences they were granted Under the scheme textile and handicraft exporters were issued licences for import of raw materials on the basis of their export values This idea of the Government was to promote exports and earn foreign exchange and as an incentive import licences were issued In total disregard of the serious consequences of the infraction and malpractice on the economy of the country, it is clear, unscrupulous exporters abused the concessions and made false declarations as regards the value of the exported goods. The values were exaggerated by inflation beyond measure and in consequence when it came to the actual realisation of the values by earning foreign exchange to the country, little foreign exchange was earned. Investigation by the Enforcement Directorate is stated to have revealed that the highly inflated and exaggerated values had brought only huge profits to the exporters from the import licences based on these false figures and relatively little foreign exchange. Under rule 6 of the Foreign Exchange Regulation Rules made by the Government of India under the Foreign Exchange Regulation Act, VII of 1947, published in notification ENF. II/52, dated 22nd April, 1952, the amount representing the full export value of the goods shall be received from the country of final destination of the goods and shall be paid to the exporter within six months from the date of shipment through the authorised dealers unless permittd otherwise by the Reserve Bank The applicants in Writ Petition No. 3651 of 1965 admitted that the firm exported handicraft goods (zari brocades) to Singapore, that they had grossly over valued the goods in the invoices, that the values mentioned in the invoices did not represent the correct value of the goods, that based on the values mentioned in the invoices they got import entitlements, and that a portion of the values mentioned in the invoices were alone repatriated to this country even the amount repatriated being something more than the actual value of the goods The difference, the applicants stated, was made up by acquisitions of foreign exchange from other sources The total value of goods exported by the applicants as per their invoices is Rs. 4,68,359. Out of this a sum

of Rs. 55,622 is said to have been repatriated as earned from the goods exported leaving outstanding Rs. 4,12,737 As against the exports, the applicants had received import entitlements valued at Rs 3,45,145. Unabashedly the applicants state in the affidavit in support of the writ.

> "*Ex hypothesi* the goods were not worth even a fraction of Rs. 4,68,559 Even the remittance of Rs. 55,622 against this is *ex hypothesi* being made by purchase of foreign exchange in respect of which offence a composite penalty of Rs 4,000 has been levied Therefore Rs 4,12,737 is not in any sense of the term payment which does not represent either the value of the goods or part thereof, nor does it represent any payment from buyers."

It is stated in the affidavit that the amount of Rs 4,12,737 shown as outstanding and not repatriated by them represents the difference between the invoice value and the actual repatriation due to over-invoicing

> "a mythical figure which does not represent the value of any existing goods or assets out of which anything can be realised."

The deponent swears thatthe applicants deliberately inflated the value of the goods exported with a view to benefit by the import licences they could get thereon, and that as the goods exported are relatively trash and practically have no market, they have not and cannot repatriate the foreign exchange in terms of the assurances they had given when getting permission for exports It is stated that when an investigation was started by the Directorate of Enforcement, the applicant hoping to avoid heavy penalties and expecting leniency made voluntary disclosure of the true position. On the admission that the amount outstanding would never be realised, a show cause notice was issued to the applicants on the 9th of July, 1965 by the Enforcement Directorate, the material part of which runs as follows :

> "And wheras .... Shri Chenna Krishna Textiles...... .. have admitted that the amount outstanding as above would never be realised
>
> And whereas failure to realise the full export value of the goods from the country of destination within the prescribed manner is a contravention of a provision of section 12 (2) of the Foreign Exchange Regulation Act, 1947 as amended up to 1964 read with Central Government Notification No 6 (8) ENF. II/52, dated 22nd April, 1952.
>
> And whereas by failure to realise the full export value of the said shipments from the concerned foreign consignees within the prescribed time as aforesaid in the prescribed manner the said Shri Chenna Krishna Textiles, appear to have contravened the provisions of section 12 (2) of the Foreign Exchange Regulation Act, 1947 as amended upto 1964 read with the Central Government Notification No 6 (8) ENF II/52, dated 22nd April, 1952 and have thereby rendered themselves liable to be proceeded against under section 23 (1) (*a*) of the said Act.
>
> Now, therefore, the said Messrs Chenna Krishna Textiles, Vembadithalam and their partners mentioned below are required to show cause in writing within 10 days of the receipt of this memorandum, why adjudication proceedings should not be held against them for the said contraventions as contemplated in section 23 (2) of the Foreign Exchange Regulation Act, 1947"

On this the applicants referring to the facts set out in their voluntary statements pleaded guilty to the charge of having contravened the provisions of sections 12 (2) of the Act in respect of the outstanding bills of the f o b. value of Rs 4,12,737—prayed for an enquiry and submitted themselves for adjudication On 27th July, 1965 the Director of Enforcement, New Delhi, passed the impugned order. A penalty of Rs 4,000 was imposed on the applicants for violation of section 4 (1) of the Foreign Exchange Regulation Act This part of the order is not questioned by the applicants in Writ Petition No 3651 of 1965 The Director of Enforcement took note of the fact that every shilling of foreign exchange which had been purchased abroad unauthorisedly and at high premiums has been brought into India under the

guise of export sale proceeds and the parties should have incurred substantial loss on account of those unauthorised purchases of foreign exchange which on repatriation has substantially benefited the country Coming to the charge under section 12 (2) of the Act, in the view that the parties did not deserve any sympathy as the outstandings were heavy and the import entitlements they got were heavier, he levied a penalty of four lakhs of rupees on the partnership of the applicants and on three of the six partners jointly and severally. It is the validity of this penalty of four lakhs that is challenged on several grounds, one of the grounds being that when in truth and effect the export value is inflated or as it is called, the goods are *over-invoiced*, there is no contravention of section 12 (2) of the Act for visiting the exporter with penalty It is argued that failure to release and remit the whole or a portion of the real or trade value of the goods without the permission of the Reserve Bank may alone amount to a contravention of section 12 (2) An examination of this plea involves the interpretation of section 12 (2) and I shall take it first for consideration.

The Foreign Exchange Regulation Act (VII of 1947) herein referred to as the Act, was enacted as it was considered expedient in the economic and financial interests of India to provide for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion. Section 12 provides :

" (1) The Central Government may by notification in the official Gazette prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India, directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be paid in the prescribed manner.

(2) Where any export of goods has been made to which a notification under sub-section (1) applies no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that —

(*a*) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(*b*) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid .

(The Act as it stood before 1st April, 1965, prior to its amendment by Act LV of 1964 being the relevant Act is set out here).

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expedient for the purpose of securing the sale of the goods and payment therefor as aforesaid and without prejudice to the generality of the foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(4) Where any goods are assigned in accordance with sub-section (3), the Central Government shall pay to the person assigning them such sum in considera-

tion of the net sum rcovered by or on behalf of the Central Government in respect of the goods as may be determined by the Central Government

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of these goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods

(6) For the purpose of ensuring compliance with the provisions of this section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner."

On the case of the applicant that the invoice value was deliberately and heavily inflated and that there is no possibility of selling the goods and realising the full export value as invoiced, or any further amount over and above that has been repatriated, sub-sections (3) and (4) have no application Sub-section (5) clearly does not apply to the case on hand, the crucial question for consideration is whether there has been contravention of section 12 (2) Section 23 which provides penalty for contraventions ran thus before its amendment by section 23, Act LV of 1964 :

"(1) If any person contravenes the provisions of section 4, section 5, section 9 or sub-section (2) of section 12 or of any rule, direction or order made thereunder he shall—

(*a*) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereafter provided, or

(*b*) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1-A) Whoever contravenes,

(*a*) any of the provision of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both ;

(*b*) any direction or order made under section 19 shall, upon conviction by a Court be punishable with fine which may extend to two thousand rupees."

Section 22 provided that no person shall, when making any application or declaration to any authority or person for any purpose under the Act, give any information or make any statement which he knows or has reasonable cause to believe to be false, or not true, in any material particular Notification No 6 (8) ENF. II/52, dated 22nd April, 1952 issued under the powers conferred under section 27 of the Act, with reference to declarations under section 12, provides by rule 5 (1) :

"The Reserve Bank, or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs or the postal authorities, may, to satisfy themselves of the due compliance with section 12 of the Act, require such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India, or has a place of business in India

(2) the Reserve Bank, or subject to such directions if any, as may be given by the Reserve Bank, the Collector of Customs, or the postal authorities may

require any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them

(i) that the destination stated on the declaration is the final place of destination of the goods exported ;

(ii) that the invoice value stated in the declaration is the full export value of the goods ; and

(iii) that the amount representing the full export value of the goods has been or will be paid to the exporter."

Rule 6 reads :

" The amount representing the full export value of goods exported shall be received from the country of final destination, of the goods, unless permitted otherwise by the Reserve Bank in its discretion, and shall be paid to the exporter within six months from the date of shipment of the goods :

* * * *

Provided further that the Reserve Bank, in its discretion, may, for sufficient and reasonable cause shown extend the said period of six months. ...."

Rules 7 runs :

" The amount representing the full value of goods exported to the countries specified in the second schedule shall be paid through an authorised dealer and unless otherwise authorised by the Reserve Bank shall be paid in the manner specified in the said schedule."

The declaration necessary under section 12 (1) of the Act for permit to make export was under rule 3 to be in form G R. 1. It requires a statement of the invoice value of the goods stating the currency and other particulars. The actual declaration in the form runs :

" I hereby declare that I am the *Seller/Consignor* of the goods in respect of which this declaration is made and that particulars given above are true and

(*a*) that the invoice value declared is the full export value of the goods and it is the same as that contracted with the buyer,

(*b*) that this is a fair valuation of the goods which are unsold.

I/my principals undertake that I/they will deliver to the Bank mentioned below foreign exchange/rupee proceeds resulting from the export of these goods on or before ... ."

It is stated that the Director of Enforcement in all the cases finds that the exported goods had been sold abroad for a very low price and the amount realised which was only the real value has been duly repatriated. He, it is also stated, finds that the balances shown as outstandings not repatriable by the exporters are fictitious figures and unreliable and that obviously even at the time of export the exporters had no intention of repatriation of the export proceeds At this stage I am considering the matter purely with reference to the contentions and not in relation to the facts of each case Whether the Director of Enforcement has accepted the truth of the voluntary statements made by the exporters and has proceeded with the adjudication on that basis is a matter to be ascertained from a scrutiny of the impugned orders That will have to be done when each case is taken up for individual consideration.

Now what falls for my discussion first is, whether when the facts are as pleaded, it could be said that there is contravention of section 12 (2) for adjudging penalty under section 23 of the Act. Section 12 (1) places an embargo on export of the notified goods, unless an assurance is given that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner. The amount representing the full value of goods exported to

the specified countries has to be realised only through an *authorised dealer* in foreign exchange, usually a bank. The documents relating to the export of the goods must pass through the medium of the bank. A declaration is taken from the exporter that he would deliver the proceeds of the export to the specified bank. Section 12 (2) comes into play after the export of goods has been made. The exporter by virtue of his declaration, is under an obligation to repatriate foreign exchange within the prescribed time. Under clause (*a*) of the declaration in the G R. 1 form he declared that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer. This declaration on its phraseology will apply to goods when the export is on a sale, and there is already a buyer with whom a contract has been entered into Where the goods have not already been sold and exporter is a consignor for sale without a firm offer from the foreign buyer then declaration (*b*) which provides that the invoice value is a fair valuation of the goods which are unsold would apply When filling up the G. R. 1. declaration form, the exporter has to strike out the clauses inapplicable in the context of the particular export. We may state that in all the cases before us the declaration is as if the export is on sale Clause (*b*) of the declaration form has been struck off. The language of the last clause of the declaration, the undertaking is rather important. The undertaking is that the exporter will deliver to the specified bank the foreign exchange/rupee proceeds *resulting from the export* of the goods by the specified date The bank which has to collect the proceeds of the export in case of consignments for sale when delivering the shipping documents takes an undertaking or trust receipt from the consignee for payment for the goods by the prescribed date The contravention alleged in all these cases in express terms is the failure of the exporters, to realise the full export value of the goods from the country of destination within the prescribed time and manner in contravention of section 12 (2) read with the notification dated 22nd April, 1952. The question is, is there a contravention falling under section 12 (2).

With reference to the case under consideration, the material part of section 12 (2) if extracted will read:

> " Where any export of goods has been made—no persom .... shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that . payment for the goods . . does not represent the full amount payable by the foreign buyer in respect of the goods ... ."

There is no question here of the sale of the goods being delayed to an unreasonable extent or there being delay in the payment for the goods, or payment being made otherwise than in the prescribed manner. I proceed on the assumption that it is nobody's case that the goods have been sold and the full foreign exchange due thereon not realised, nor anybody's case that the goods remaining unsold could be sold One thing is made out that the invoice value has not been realised and brought into this country.

I find no difficulty in holding that section 12 (2) applies to cases both of export on sale and export for sale, that is, consignment sale as referred at the Bar, though there was considerable discussion on this section 12 must be read in its entirety and sub-section 12 (2) interpreted in the context. The language no doubt is rather unhappy, but the legislative intent is clear. The person referred to as *the person entitled to sell or procure the sale of* in the first part of section 12 (2) is only descriptive and can include a case where the person has actually sold or procured the sale of the goods In the Indian Sales of Goods Act, the words *Buyer and Seller* subject to the context, may mean both a person who buys or agrees to buy and a person who sells or agrees to sell as the case may be In the context of the provisions under consideration it appears to me that it can, without violence to the language and bearing in mind the scope and object of the Act, include a person who sells or has sold, or a consignor for sale who offers for sale the goods exported There is nothing incongruous or incompatible in applying section 12 (3) (*a*) or (*b*) to the case of an export on sale, that is to a case where there is a contract of sale with a foreign buyer.

Even where there is a firm contract of sale with a specified buyer, the completion of the sale may be delayed for various reasons and property may not pass immediately on the goods being placed on board the ship The sub-section, of course, *ex facie* applies to the case of consignment for sale, that is, an export by a consignor of goods to a consignee for sale, but it clearly takes in also cases where there are firm contracts of sale.

Certain possibilities in the interpretation of the expression *full amount payable by the foreign buyer* in section 12 (2) (*b*) have also to be examined The expression manifestly applies to a case where there is a seller and a specified buyer who has contracted to buy the export being on sale To my mind the words *full amount payable by the foreign buyer*, may conceivably also take in a possible buyer or would be buyer in the case of an export to a consignee for sale. The assurance given by the exporter in his G. R 1 form, a statutorily prescribed form, to repatriate the foreign exchange proceeds *resulting from the export* of goods by a fixed date, provides a key to such interpretation It is a determinable objective value, and may be more or less than the full export value. It is what actually results from the export, of course, which is *bona fide* earned on the export In that view the fact that the person entered as buyer in the form turns out to be in fact a consignee for sale, or a nominee of the buyer, as is claimed, for some of the exporters may not be material Foreign buyers must obviously be in contemplation of the exporter when the invoice value is given in the G R 1 form Declaration (*a*) in the form brings out clearly that every dollar or shilling of foreign exchange available by the export must be secured to the country The four expressions therein, *invoice value, full export value, the value contracted with the buyer and proceeds resulting from the export* are all intended to convey the same central theme The related rule 7 in the rules uses the phrase *full value of goods exported* The Act, the rules and forms thereunder are applicable, by and large, to trade and business people and must be construed, if possible, not finding strict or nice destinctions of looking for the nuances and shades in the meaning, but giving a reasonable and business interpretation bearing in mind the governing object of the legislation The intention is clear, that an assurance is taken from the exporter to secure to the country the full value of the goods on export, and the same idea is expressed in different terms choosing phraseology related to the context The exporter is made to declare solemnly that the value contracted with the buyer is the invoice value to provide against secret understandings between the buyer and the seller and false invoice values The expression *full export value* is nowhere defined and due significance must be given to the adjective *full* By *full export value* is obviously meant the maximum value the exported goods can earn to the country the value a *bona fide* exporter in this country would expect for the goods and the value a *bona fide* importer in the foreign country would pay for the export It is not some notional or fictitious value the exporter may choose to give in filling up the form The word *export* in the phrase is also used only as an adjective qualifying the noun value The exporter cannot knowingly undervalue the goods or deliberately inflate the values.

Here, according to the case of the parties the major part of the invoice value or full export value of the goods as shown in the G R 1 form has not been repatriated or realised and it is not possible at all to realise, as the exporter never intended to realise the same and knew full well even before the export that the invoice value or full export value is not the real or true value of the goods His original declared value of the goods would normally be taken as the full amount payable by the foreign buyer in respect of the goods May be in certain circumstances, *bona fide* there may be difference between the declared value and the actual realisation, it may be due to causes beyond the control of the exporter I need not consider here such contingency But I would interpret the *full amount payable by the foreign buyer* found in section 12 (2) (*b*) as the amount which a sale of the goods in the open export market would fetch for the goods where the buyer and seller are independent of each other and the price is their sale consideration and they are not influenced by any commercial

or financial or other relationship except as buyer and seller Also no part of the proceeds or profits by re-sale or use or disposal of the goods should accrue either directly or indirectly to the seller.

Now to come to the contravention of section 12 (2), assuming for the moment that the exporter should be held to his declaration and will not be permitted to plead otherwise, can it be said, that after the export he has done or refrained from doing any act with intent to secure that the payment for the goods does not represent the full amount payable by the foreign buyer in respect of the goods? What is it the exporter can be said to have done or refrained from doing after export of the goods with intent that the full amount as declared is not realised? If his case is accepted, he had exported goods which could not fetch in the market anything like the invoice value Nothing he could do thereafter, will alter the position. There is no lawful action he can take after the export to ensure the realisation of the declared export value for him to be charged with any non-action in the matter. Does the Act contemplate the failure of the exporter to enforce the undertaking secured for the exporter by the bank in case of consignment sales an inaction in contravention of the section One thing is clear. It is not every inaction that would amount to contravention of section 12 (2) The exporter must refrain from doing an act, that is, there must be abstention from an act or from taking a step and the abstention or inaction should be with a view to secure that the full amount is not realised The intention in this regard is a necessary element Can we postulate continuance of an intention not to secure the full declared value when there is no possibility at all of securing the full value after the export? It was stated by the learned Advocate-General at one stage of the arguments, that the failure of the exporter to enforce the letter of undertaking which the authorised dealer in India through whom the related bills are negotiated or collected or through whom payment for the goods is received, is the inaction. The immediate answer to this is that the letter of undertaking is taken only in cases of consignment for sale—see the certificate by the authorised dealer on the duplicate of the G R. 1 form. In the case of export on sale, which the cases on hand apparently are, the bills are negotiated through or taken for collection by the bank for realisation, documents against bills, or there is letter of credit. Even if there is any undertaking, if it should be found as a fact that the whole thing is false and a make-believe and the invoice value or the so-called contracted value with the foreign buyer are fictitious figures how can there be enforcement of any undertaking to secure the full amount? When we speak of action or non-action with intent to secure something, we contemplate a possibility of the thing going awry otherwise? True the exporter declares that the amount representing the full export value of the goods will be paid to him within the prescribed period But even while making the declaration he has seen to it that the goods exported are not any where the value declared and that they can have no market. In fact his plea is that they are not marketable goods at all No further intent is necessary after the export to secure that the full amount, why even a fair fraction of it, is not realised.

True, interpreted in this manner, the exporter escapes from his obligation and his contravention will not fall under section 12 (2) It may be that he is pleading his own fraud and falsity to escape from the penalty provided under the section, a deliberate dereliction of duty and an offence to society in the present context of the country's economy of a very grave nature But penalties are purely creatures of the Legislature They cannot be created by judicial implication and must be expressly imposed by a statute. For the imposition of a penalty the provision of law must be clear and free from doubt. Laws imposing penalties cannot be extended by construction to anything beyond the letter of the law even though within their spirit. It must be noted that in this case section 23 provides also for criminal prosecution where heavy punishment is necessary The language of the statute cannot be construed as having one meaning if criminal proceedings are brought and a different meaning when penalties are imposed. As pointed out in *Shanti Prasad* v. *Director*

of Enforcement[1]. proceedings under the Act are quasi criminal in character and it is the duty of the department as prosecutor to make out beyond all reasonable doubt that there has been a violation of the law. Their Lordships of the Supreme Court referred to the decision in *H P C Productions Ltd., In re*[2] No doubt a statute should not be so construed so as to narrow the words, of the statute to the exclusion of cases which those words in their ordinary acceptation would comprehend The principle of interpretation quoted from the observations of the judicial Committee in *Dyke* v. *Elliott, the gauntlet*[3], at page 533 in Craies on Statute Law, sixth edition, may be usefully referred to;

> " No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment But where the thing is brought within the words and within the spirit there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not to be found or made in the same language in any other instrument."

We have to construe a penal provision like any other provision fairly according to the legislative intent as expressed in the enactment and brought out by the language used. We have to refuse to extend the penalty to cases which are not clearly embraced in them, while firmly avoiding exoneration of parties plainly within the scope of the language by forced construction of the language on so-called equitable grounds.

One possible approach which the Director of Enforcement may adopt is to preclude a declarent from affirming anything contrary to his assurance, to ignore the plea that the goods even at the time of the export had no value in the market, to hold the declarant to the value he has assured to repatriate and charge him with failure to repatriate funds in terms of his undertaking The Director may consider that the so-called confession of fraud and falsity may itself be false and refuse to accept the same As this is a possible approach by the Director of Enforcement, consideration of this aspect of the matter will have to be taken up when examining the orders of the Director individually. In interpreting the orders, the Court has to bear in mind the manner in which adjudication has been invited by voluntary disclosure the so-called confession and the plea of guilty to the charges framed. Scrutiny of the facts of each individual case and sifting of evidence by the Director has been avoided by the parties by their conduct in the proceedings. When we take up the individual cases for examination, we have to see whether apart from referring to the confessions, their truth is accepted by the Director It is one thing to narrate and refer to the confessional statement for adjudicating penalty; it is quite a different thing to accept it as true and found a contravention in law on the facts as confessed The Director of Enforcement is not bound to accept the explanation submitted, their alleged malpractice as the reason for their inability to secure the declared value But if as stated by the applicants, the Director in his orders is satisfied about the truth of the plea and find that the applicants had at the very outset deliberately over-invoiced and inflated beyond measure the export value of the goods, the applicants are on firmer grounds in their defence to the charge of contravention of section 12 (2) If the inference from the orders is that the Director accepts the truth of the confession, then he would be ignoring the facts which he finds true for the purpose of levying penalty The state of things as originally

1 A I R 1962 S C 1764, 1775
2 (1962) 2 W L R. 51.
3 (1872) L R 4 P C 184, 191.

declared when securing permit for export and getting the benefit of import licences are taken as true and the declarant notwithstanding that the truth is known, estopped from asserting the contrary. The question is whether that can be done when adjudicating penalty For levying a penalty the department has to establish contravention of the law or rules made thereunder Unless the statute specifically provides for it, it will be negation of all principles of jurisprudence to hold a man guilty on a fictitious state of affairs A false declaration under the Act has been specifically made an offence, and there are provisions for punishing such transgression of the Act.

Can the principle of estoppel be applied in quasi criminal proceedings to shut the mouth of the delinquent and turn a Nelson's eye to truth? May be the facts of the case before me require that that should be the state of law. But even in civil actions estoppel by representations have rarely been held to provide a cause of action by itself In *Burkinshaw* v. *Nicolls*[1], Lord Blackburn observe at page 1026:

> "When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon that basis that they do exist' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action"

The principle of estoppel, it has been said, ha always been made for righteousness and operated to defeat grossly dishonest claims or defence When an exporter is being proceeded against for contravention of section 12 (2), in the proceedings the exporter does not make any claim of his own He seeks to avoid the penalty that may be levied or defend against the conviction Offences are defined by statutes and have to be founded on facts proved or established or deemed by statutes to have been proved or established and not on presumptions or assumed state of circumstances. Justice has to be administered according to law and even a felon has to be judged only under the law Then only is justice rendered A man cannot be convicted even on his own confession of guilt if the Court finds that the confession is not true or on the facts confessed he is not guilty of the offence to which he pleads guilty. If in a particular case before us it is found that the foreign exchange proceeds actually resulting from the export of goods, is not the invoice value or full export value of the goods as declared and the proceeds of the export realised, fall considerably short of the declared value, the exporter, in my view, cannot be held to be guilty of contravention of section 12 (2) by not repatriating the full amount payable by the foreign buyer if he had not done anything to secure that result after the export. I may reiterate what I have said earlier that in interpreting the orders of the Director, the circumstances in which the orders were made have to be borne in mind The parties have pleaded guilty and one of the orders shows that the Director was aware that *over-invoicing* as the fraud played by the applicants, has been euphemistically called, by itself, will not be an offence under section 12 (2) of the Act That being so, unless the Court is convinced that the Director clearly erred in law and the error of law is apparent on the face of the record, this Court will not exercise its prerogative jurisdiction in *certiorari*. Formal or technical errors or slips in the terminology used by the Director, even though they appear to be errors in law, will not be sufficient to attract the extraordinary jurisdiction of this Court if in substance the orders could be maintained in accordance with law.

The other point I take up for consideration is the plea by the learned Advocate-General that as the applicants in these cases base their claims to relief with a story of their own perfidy, this Court will not exercise, in their favour the discretionary relief of *certiorari* Reliance is placed on the well known maxim of *equity ex turpi causa non oritur actio* (out of turpitude no cause of action arises) and it is contended that while exercising the special jurisdiction, the Court is entitled to have regard to the conduct of the applicant and decline relief if he has not approached the Court with clean hands The applicants on their own showing have violated the laws.

1. (1878) L R 3 App Cas. 1004.

enacted for protection of the economic and financial interests of the nation, and relief in proceedings by way of *certiorari* is not granted as a matter of course and cannot be had as a matter of right. But there is a danger with these pity equity maxims which has to be guarded against. They enunciate no doubt equitable rules based on certain moral principles but, if just extended by logical process in the modern complex society they are apt to be carried far beyond the original purpose and may cease to be equitable.

It cannot be seriously disputed that the order for the issue of *certiorari* is strictly a matter of discretion, the relief being granted for the advancement of justice and to strike down injustice. But Mr. M. K. Nambiar, Counsel for one set of applicants, contends that discretion both in the granting and withholding of relief now runs more or less in fairly well evolved channels and that it is only certain conduct in relation to the very proceedings in Court that would disentitle the applicants to relief. Other Counsel appearing for the applicants adopted this argument and it is stated that the requirement in this regard is that the applicants should not make before the Court in the proceedings for *certiorari* any statement which is false or conceal something from the Court which is relevant. It is stated that if the Court has reason to be satisfied that there has been deliberate concealment of facts so as to mislead the Court, the Court will decline to consider the merits of the case and reject the application. A number of cases were cited where the rule has been applied and relief refused to the applicants. In view of the strenuous arguments of learned Counsel that the conduct pleaded in the present cases is not of the type contemplated for declining relief in the exercise of discretion, I propose to examine the matter at some length. No direct case has been cited before us placing a limit on the discretionary power of the Court in the matter of withholding relief and making its exercise mandatory wherever a Tribunal has gone wrong in law and the error is a serious one apparent on the face of the record, however unmeritorious and undeserving the applicant may be. Learned Counsel referred us to a decision of this Court in *Issardas* v. *Collector of Madras*[1], wherein Ramachandra Ayyar, J., (as he then was), after examining several decisions observed at page 530:

> "Thus a writ of *certiorari* is issued at the discretion of the Superior Court. It cannot be held to be a writ of right or one issued as a matter of course. But for the exercise of the discretion of the Court, there are some well accepted principles. In issuing the writ, if the Court . . . . is moved by a party aggrieved by the order of the inferior tribunal, the Court is bound to issue the writ at his instance, except in cases where he had disentitled himself to the discretionary relief by reason of his own conduct like submission to jurisdiction, laches, etc."

Reference was also made to *Gopalan* v. *State of Madras*[2], at page 40 where Lord Atkin's dicta at page 670 in *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering*[3], that in accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of British subject except when he can support the legality of his act before a Court of justice, was referred to. Counsel also relied on the dicta of Scrutton, L.J., in *Rex.* v. *Secretary of State for Home Affairs O'Brien, Ex parte*[4], at page 382:

> "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous, and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A man undoubtedly guilty of murder must yet be released, if due forms of law have not been followed in his conviction. It is quite possible even probable, that the subject in this case is guilty of high treason, he is still entitled only to be deprived of his liberty by due process of law."

Reference was made to the passage at page 140 in Halsbury's Laws of England, volume XI, Simonds edition, wherein with respect to application for *certiorari* by a party aggrieved it is observed:

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1. (1959) 2 M.L.J. 136: (1959) M.L.J. (Crl.) 601: A.I.R. 1959 Mad. 528.
2. (1950) 2 M.L.J. 42: (1950) S.C.R. 88: A.I.R. 1950 S.C. 27 at Page 40.
3. L.R. (1931) A.C. 662.
4. L.R. (1923) 2 K.B. 361.

"Although the order is not of course it will though discretionary nevertheless be granted *ex debito justitiae*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief."

Ex debito justitiae only means from what is due to justice. It is interesting to note that the cases given in the footnote with reference to the principle that the conduct of a party may disentitle him to relief are grouped under the following heads : acquiescence in irregularity complained of; second application on amended affidavits, undue delay in applying for the writ; acquiescence in jurisdiction of Court below , failure to object below to constitution of Court ; and waiver of the right to object on the ground of interest of the Tribunal. The argument naturally is that the conduct that would disentitle an applicant to relief must fall under one or other of the above heads Learned Counsel would limit the scope in the decision of this Court in *Issardas* v. *Collector of Madras*[1], to conduct *ejusdum generis* with submission to jurisdiction, and laches

In *Sangram Singh* v. *Election Tribunal Kotah*[2], it is observed at page 429 :

"That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law The High Court do not, and should not, act as Courts of appeal under Article 226 Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily, and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued or is likely to ensue."

In *A M. Allison* v *B.L.Sen*[3], it is stated at page 231 :

"Proceedings by way of *certiorari* are ' not of course ' (*vide* Halsbury's Laws of England, Hailsham edition, volume IX, paras 1480 and 1481, pages 877, 878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it."

In Short and Mellor's Crown Practice, second edition, at page 15 is found the following rule .

"The writ of *certiorari* is demandable of absolute right by the Crown but is granted to the subject at the discretion of the Court or a Judge "

At page 48 of the same book is found the following statement of the position :

"It was formerly held that a *certiorari* would not be granted *ex debito justitiae* but that it was in the discretion of the Court ; but in *The Queen* v. *Justices of Surrey*[4], it was held that to a party aggrieved it ought to be granted *ex debito justitiae*, but that to an applicant who only comes forward as one of the public, the Court ought to exercise its discretion, and that the writ is not, on any grounds, a writ of course.

The Court must be satisfied that sufficient grounds exist for issuing the writ and even where the applicant is a party aggrieved, if he has by his conduct precluded himself from taking an objection, the Court will not permit him to take it (*Regina* v. *The South Holland Drainage Committee Men, Ex parte Prest*[5] ".

In S A. De Smith's Judicial Review of Administrative Action it is stated at page 316 :

"Waiver, acquiescence and laches are not the only discrtionary bars to the award of *certiorari* and prohibition. The Court is entitled to have regard generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks "

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1 (1959) 2 M L J 136 · (1959) M L J (Crl) 601 : A I R 1959 Mad 528.
2. (1955) S C J 431 : (1955) 2 M L J (S C) 13 · A I R. 1955 S C 425.
3 (1957) S C J 268 · (1957) S C R 359: (1957) M L J (Crl) 175 : A I R 1957 S C 227.
4 (1870) L R. 5 Q B 466.
5 (1838) 8 L J Q B 64.

Of the three cases relied on by the learned author in the footnote for the proposition, in one case the application for prohibition was refused beacuse the applicant had misrepresented and suppressed the material facts in her affidavit. Another application for *certiorari* was refused because of the serious misrepresentations in the counter affidavit With reference to the third case, *Ex parte Fry*[1], which I shall be referring to presently the learned author states that the ground for refusal of *certiorari* was the *exceedingly foolish and unreasonable conduct of the applicant* The learned Advocate-General, apart from referring to certain cases where relief has been refused in equity jurisdiction, the legal maxims *ex turpi causa non oritur actio and nullus commodum copere potest de injuria sua propria* (no man can take advantage of his own wrong) and the principle son which equity jurisdiction is exercised, relied upon three cases in particular *Ex pare Fry*[1], already referred to, *Co-operative Marketing Society* v *Sriramulu*[2], and *Abdul Shukoor* v *R C & E Officer*[3] The third case does support the proposition now put forward by the Advocate-General Dhavan, J, in holding that the petitioner who came into Court founding his cause of action on an illegality would not get any assistance from the Court, observed at page 452 ·

> " A petitioner who comes into Court founding his cause of action on an illegality, will not get any assistance from the Court *Ex turpi causa non obitur actio* (out of turpitude, no cause of action arises) As long ago as 1767 Wilmot, C J, observed in the case of *Collins* v. *Blantern*[4].
>
> ' You shall not stipulate for inquiry All writers upon our law agree to this, no polluted hand shall touch the pure fountains of justice Whoever is a party to an unlawful contract if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action, when you come into a Court of justice in this unclean manner to recover it back' "

The principles enunciated above have been extended to the jurisdiction of this Court under Article 226 of the Constitution A petitioner who does not come to this Court with clean hands or who come with his hands soiled with an illegal transaction made with the deliberate object of defeating the provisions of the law, disentitles himself to any relief from the Court

This is certainly a case where the conduct of the applicant for which he was disentitled to relief was not in the course of the proceedings It was outside the proceeding and proceeded the initiation of the proceeding The applicant prayed for quashing an order of the Rent Control and Eviction Officer declaring a godown belonging to the petitioner has vacant for allotment The respondents to the application were applicants before the Rent Control and Eviction Officer for allotment of the premises to them The premises in question had been released to the petitioner earlier for his personal use and applications for allotment were made by others contending that he has sub-let the premises in contravention of the release order The petitioner ostensibly was having the business in partnership with others in the premises The Rent Control and Eviction Officer found that the deed of partnership was not a genuine one, but a transaction transferring possession of the godown to others for consideration and that it was an illegal form of sub-letting and a device to evade the provisions of the rent control law On this finding he declared the godown vacant for allotment It is this order that was sought to be quashed in the *certiorari* proceeding. The learned Judge on the writ held that there was material on record to justify the finding The passage quote d above comes after this finding the learned Judge ultimately observing that the petitioner would not have been entitled to any relief under Article 226 even if he had made out a case, which he had not. Earlier the learned Judge observed that the petitioner had not been candid with the Court in his presentation of facts in the affidavit supporting the petition The learned Judge has relied on a Division Bench case of the Allahabad High Court in *Azizum Nisa* v *Assistant Custodian*[5] In that case it was held, that where the party

1 (1954) 2 All E R 118, 122
2 (1960) 1 An W R 57
3. A I R 1959 All 440
4 95 E R 847
5 A I R 1957 All 561.

applying for a writ of *certiorari*, was guilty of laches which was not explained and had also submitted to the jurisdiction of the authority, whose order was sought to be quashed, nor filed an appeal against the order though permitted under the law, the Court would not on account of the conduct of the applicant, in its discretion, interfere with the order under Article 226 It will be seen that in the above case of *Abdul Shakoor* v *R C & E Officer*[1], the Court could grant no relief whatsoever to the petitioner under Article 226 The right to relief was rested on an illegal transaction but it was not a case where the illegality as found did not warrant the order as passed by the Tribunal The Tribunal had not acted outside the law and had, on the facts, jurisdiction to declare the vacancy and direct an allotment. The observations are, therefore, obiter.

In *Co-operative Marketing Society* v. *Sriramulu*[2], the Division Bench of the Andhra Pradesh High Court remarks at page 62

> " Lastly, we must observe that this Court is averse to lend its helping hand to persons who want to defraud others. Even assuming that any errors of law was committed by Tribunals, that would not be a ground for invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution, when it is not in furtherance of justice but tends to encourage dishonesty "

If I may say so with respect, the principle enunciated is unexceptionable. Difficulty will arise when we have to determine whether it will apply to the facts of any particular case The case which was under consideration there was not a case where remedy was sought to quash any penalty levied illegally or contrary to law. The validity of a reference under section 51 of the Madras Co-operative Societies Act was challenged on the ground that as the business carried on by the persons in management of the society was an illegal one, the business would not come within the definition of business under section 51 of the Act for reference of a dispute as one touching the business of the society While holding the validity of the reference in law as a further ground, the observations quoted above were made

The Judgment in *Ex parte Fry*[3], relied upon by the learned Advocate-General has been considered to be a case of non-interference on the ground that the applicant was exceedingly foolish and his conduct was unreasonable. The applicant in that case was a fireman who had disobeyed an order to clean his superior officer's uniform and was given a caution by the Chief Fire Officer under the Fire Services (Discipline) Regulations For refusing the relief it was stated at page 122.

> " The applicant is a member of a service which is of great public importance. For the good of that service and of those who are employed in the service the Secretary of State has made regulations so that their position may be ascertained and there may be as few difficulties as possible There is ' a complete code ' If a man feels that he is ordered to do something which he ought not to be ordered to do, he can raise the matter in the way that I have said, but if, instead of doing that, he deliberately sets out to disobey the order given to him by a superior officer, he is only making difficulties for himself and for the whole of the service, and that is something which he ought to realise . . . In the circumstances of the present case there was no appeal . because the punishment inflicted was only a caution, but there are ways and means of bringing to the notice of the fire authority in a proper case the conduct of one who has to preside over a disciplinary tribunal of this kind if it is thought right and proper that that would be done "

With reference to this case, Wade in his Administrative Law, 1961, at page 162, after stating about the Court's refusal of their aid because the remedy was discretionary remarks .

> " The sensible course would have been for him to obey the order and complain afterwards to the fire authority rather than disobey and take legal action. This

1 A I R 1959 All 440
2 (1960) 1 An W R 57
3 (1954) 2 All E R 118

put the whole matter on a sounder footing . . .. judicial control must be confined to cases where there is some complaint of real injustice "

It is a case where a caution was administered and the Court thought that there were other ways for the aggrieved fireman to establish that the caution administered was unwarranted The decision cannot be a sure guide if the penalty adjudged is heavy and bears no reasonable relation to the turpitude of the applicant. In the leading case referred to in the text books and relied on in subsequent cases for the discretionary character of *certiorari* jurdiction, *The Queen* v *Justices of Surrey*[1], Lord Blackburn laid down the principle thus at page 473 :

" Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it as in *Regina* v. *The South Holland Drainage Committee Men, ex parte Prest*[2].

In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as *ex debito justitiae* . . ".

As the case in *Regina* v. *The South Holland Drainage Committee Men, ex parte Prest*[2], is generally referred to in all the subsequent cases and relied upon by the text books as an authority for the position that even to a party aggrieved who may be entitled to *certiorari ex debito justitiae* relief may be declined by the Court having regard to his conduct, it will be useful to examine the case in some detail.

In that case a writ of *certiorari* to bring up an inquisition under a local Act for being quashed on *certiorari* was refused at the instance of a party who had waived the regular notice to treat and allowed the inquisition to be taken before the proper time and who had allowed the calculations to be taken for compensation in a mode not authorised by the Act It was made out in the affidavit in answer that the defect in the procedure was as a result of express consent and waiver on the part of the applicant. With reference to the calculations the applicant was a patry to the arrangement under which the calculations were made. There was another objection and it is that which is relevant here, that compensation had been provided as if it was freehold land whereas in fact it was copyhold property and that compensation ought to have been provided for the Lords of the manor in respect of their interest in the premises. The Lord of the manor also appeared at the hearing as his interest was involved, the assessment of the compensation being final and conclusive upon all parties and the Jury had only to apportion the compensation among the different interests. It was doubtful whether copyholds could be taken at all. Lord Denman, C J., in discharging the rule observed at page 65 :

" It must not be supposed, because we discharge this rule, that we are setting up this inquisition, and saying that it is good. That is not the case ....With regard to this being copyhold land, I think nothing of the objection, because it does not appear that the nature of the tenure was disclosed But, whether this inquisition be good or bad, the present party is not competent to apply to us. The first objection never could have existed, if he had not expressly waived the notice ; and as to the mode of compensation, the objection is answered in the same manner."

The decision of Patterson, J., in the case is of considerable interest, as it reveals one other aspect on which discretion was refused. Patterson, J , observed at page 66:

" We only say, that this party is not in a condition to ask us to interfere It is said that the inquisition was unduly taken, and the witnesses may not be indictable for perjury Whose fault is that ? The applicant has to thank himself. So also, with regard to this being copyhold land, he deceived the committee men, and concealed from them that fact. Indeed, he has conducted himself in such a manner as not to have entitled himself to relief."

1. (1870) L R. 5 Q.B. 466. 2. (1838) 8 L J.Q B 64.

Certiorari was refused in this case on two grounds, waiver and acquiescence in respect of certain procedural illegalities. In regard to a matter which went more or less to the root of the jurisdiction, the character of the property, the applicant has misled the Tribunal whose order was challenged. He had deceived the committee men who passed the original order and concealed from them the true nature of the property. Before the Court in his affidavit for the first time he pleaded that the land was copyhold. He was pleading the truth no doubt. But he attempted to get over his own falsity and deception. He had to thank himself for the result. The order in question which was sought to be quashed in that case was brought on himself by his practising deception before the committee and he sought to get over the order pleading the truth before the Court and properly the Court rejected relief. The Court refused to exercise its discretion in his favour. He had no right to complain having represented the land to be freehold and obtained for himself the value of a freehold land. Applying the principle of the case to the cases on hand if the applicants had kept back the truth from the Director of Enforcement and for the first time before this Court pleaded their inequity and fraud and asked this Court to grant them relief, as section 12 (2) would not apply to a case of over-invoicing, this Court may, in my opinion, *in limine* reject the applications for relief. In such cases, the case for relief is founded on the plea of fraud. The basis for the prerogative relief of *certiorari* then would be that the applicants had deceived the Department but that on the true facts as disclosed for the first time in the affidavit before Court, there could be no contravention of section 12 (2). In such cases even if the Department is not in a position to contradict the facts, this Court will refuse relief as the relief is directly founded on fraud. This Court is then asked to accept the dishonesty and fraud of the applicants as a fact and grant them relief on that basis—*but nemo allegans turpitudinem suam est audiendus* (no one alleging his own baseness is to be heard). It may be different if the applicant is not asking this Court to accept his plea of falsity and grant him relief on that ground. In a case, where the applicant states that the Tribunal has accepted and found the true facts and uncovered his fraud but contends that on the facts so found the Tribunal has levied a penalty which it has no jurisdiction to levy, it cannot be said to be a case where the cause of action has been founded on turpitude or the equity sued for rests on falsity and baseness. All that the applicant then contends is that on the facts found the Tribunal has acted illegally and without jurisdiction in levying the penalty. He does not challenge the facts found. The act complained of is the act of the Tribunal or body. The Tribunal according to the applicant, has found the true facts which no doubt he had earlier concealed fraudulently. The applicant in such a case wants the Tribunal to be contained within the law and to punish him on the facts found.

Reference was made at the Bar to the observation in *Public Passenger Service Ltd.* v. *M. A. Khadar*[1] :

> " Counsel then relied upon the well-known maxim of equity that ' he who comes into equity must come with clean hands ' and contended that the Courts below should have dismissed the applications as the respondents did not come with clean hands. This contention must be rejected for several reasons. The respondents are not seeking equitable relief against forfeiture. They are asserting their legal right to the shares on the ground that the forfeiture is invalid, and they continue to be the legal owners of the shares. Secondly, the maxim does not mean that every improper conduct of the applicant disentitles him to equitable relief. The maxim may be invoked where the conduct complained of is unfair and unjust in relation to the subject-matter of the litigation and the equity sued for."

That was a case of discretionary relief and Counsel for the applicants rely on the above observations for their contention that what they claim here is only the application of law to the facts found. The learned Advocate-General lays emphasis on the last sentence in the above quotation.

1. (1966) 1 S.C.J. 68: (1966) 1 M.L.J. (S.C.) 23 : (1966) 1 An.W.R. (S.C.) 23 : A.I.R. 1966 S.C. 489 at 492.

To sum up, the cases cited at the Bar show that while the writ of *certiorari* is considered to be a discretionary relief which the Court is not bound to grant even at the instance of the aggrieved party, the refusal of the relief in the exercise of the Court's jurisdiction is generally found when the applicant is guilty of laches or acquiescence or waiver or where the applicant has not approached the Court in good faith Where the applicant lacked *uberrima fides* and where there was suppression of material facts the application was refused Cases may be referred to where the discretion is exercised in favour of an applicant when his laches or acquiescence is the result of ignorance, accident, etc Relief has also been denied if the claim to relief is founded on the applicant's own fraud or dishonesty The Court looks to the conduct of the applicant when the question is, which way the discretion has to be exercised. It is not every improper conduct of the applicant that should disentitle him to relief. Depravity of conduct on the part of the applicant or falsity or dishonesty on his part that would preclude him from claiming relief, apart from special circumstances of a particular case must in my view ordinarily be so related to the relief claimed that recognition of the dishonesty or falsity or depravity of conduct by the Court is first called for before relief is granted Ordinarily to deny the applicant the justice he is found entitled to, the relief must rest on the prayer to the Court to accept his depraved conduct as the truth But that is not to say that conduct of the applicant when not made the basis for relief should in no case disentitle the applicant to *certiorari*, judicial discretion can never be circumscribed that way. If we hold in the present cases that the applicants want this Court to find the fraud and falsity of their declaration, may be it is not controverted, and thereon in law hold that section 12 (2) of the Act will not apply, they would be cases where relief would rest on our finding the turpitude pleaded Even in such cases if the penalty besides being beyond the jurisdiction of the Tribunal shocks the conscience of the Court or the application of the law is outrageously perverse *ex debito justitiae* the Court would properly interfere If there is no adequate alternative remedy I would say it should interfere *Arthur* v *Commissioners of Sewers in Yorkshire*[1] To my mind it seems that if the Director of Enforcement has accepted the confessional statements as representing the true state of facts, as this Court is not called upon for the first time to adjudicate on the facts and act upon the baseness set out in the affidavit, the applicants would only be claiming that the Tribunal should be told to apply the law to the facts found The Tribunal has to act according to law on the facts which it finds, and the question will be whether the applicants in law deserve the penalty which has been levied upon them. The question thus put in issue has nothing to do with their conduct Dishonesty and falsity are closed chapters, certain facts are found as true by the Tribunal and it has to act thereon. To my mind if the law does not permit a penalty on the facts found, that would be a plain case of usurpation of jurisdiction which the superior Court will not allow

But that is not all Other circumstances may still weigh with the Court to stay its hands and not exercise this special jurisdiction in favour of such applicants. In the cases before us, if in any particular case there is ambiguity in the order and it is not clear that the confession has been accepted in full it would be a case of the applicant asking this Court on the materials before this Court, taking into consideration the counter affidavit of the department to accept the truth of his confession. This, we are not bound to do in the special jurisdiction As I have said earlier, the Tribunal could have refused to go behind the declarations and held the applicants on to their declaration In fact it is beyond my comprehension how such a huge fraud had been committed without detection Lakhs and lakhs worth of handicraft goods are stated to have been exported on export permits and it is stated now that the goods were of no value and were worthless goods which had no market even at the time of export Section 12 (6) of the Act authorises the authority to call for evidence to show that the full amount payable by the foreign buyer in respect of the goods will be paid in the prescribed manner It is astonishing that despite

1. 88 E R. 237

the wide powers the authorities have, the nature of the goods exported has escaped detection before shipping These exports were made after incentive had been offered by import licences and import licences were granted in advance before receipt of the proceeds of export One would expect, in such circumstances, grater scrutiny and vigilence on the part of those who look after these exports and imports Is it supine indifference to what was passing under their very nose, lack of diligence or gross dereliction of duty, or what? Naturally, Mr K Srinivasan, Counsel for one set of applicants submits to us, that over-invoicing has been the trade practice and the Department themselves have winked at over-invoicing as the State stood to gain by the anticipated foreign exchange Learned Counsel contends that unbecoming conduct, in such circumstances, cannot be levelled, on the exporter only, and that is offset by laches on the part of the Department I am not prepared to countenance this wild suggestion and even otherwise two wrongs cannot make a right. The contravention of the exchange Rules by the applicants is deliberate and a grave one It is a violation of laws made in national interest and in public good for the protection of the country's foreign trade and exchange position and local economy We do not know whether there has been full probe into the truth of the dealings and there is acceptance of the confession after full scrutiny and examination of the matter. If the confession itself is false, that is not improbable it will be apparent that the exporters would be keeping out large amounts of foreign exchange having succeeded in their defence here

Having regard to these aspects of the matter, I think this Court will be justified, if not on other grounds on the one ground that there is a remedy by way of appeal against the order of the Director of Enforcement to decline relief in these proceedings Section 23-E provides for an appeal to the Foreign Exchange Regulation Appellate Board from orders of the Director of Enforcement made under section 23 There is a further appeal from the order of the Appellate Board to the High Court on questions of law under section 23-EE. No doubt before an appeal is heard by the Appellate Board, the appellant would have to deposit the sum imposed by way of penalty Learned Counsel for the appellants would contend that having regard to this circumstance they have no effective alternative remedy It is submitted that the provision as to the deposit of the penalty amount, in effect deprives the applicants of the remedy by way of appeal Our attention was drawn in this connection to the decision of the Supreme Court in *Customs Collector, Bombay* v. *Shantilal & Co* [1], where it is observed at page 202:

> "Lastly it was argued that the High Court should not have exercised its jurisdiction under Article 226 of the Constitution, as the respondents had an effective remedy by way of appeal to higher Customs Authorities. But the High Court rightly pointed out that the respondents had no effective remedy, for they could not file an appeal without depositing as a condition precedent the large amount of penalty imposed on them That apart, the existence of an effective remedy does not oust the jurisdiction of the High Court, but it is only one of the circumstances that the Court should take into consideration in exercising its discretionary jurisdiction under Article 226 of the Constitution In this case, the High Court thought fit to exercise its jurisdiction under Article 226 of the Constitution and we do not see any exceptional circumstances to interfere with the discretion."

I fail to see how these observations can help the applicants in these cases The existence of an alternative remedy of course does not bar this Court from interfering under Article 226 when interference is necessary But this Court has discretion in the matter and it will have to consider whether in a particular case the other remedy is futile In *Sales Tax Officer* v *M/s Shiv Ratan*[2], their Lordships observed at page 144

> "We are of the opinion that the High Court should have declined to entertain the petition No exceptional circumstances exist in this case to warrant the

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1 (1966) 1 S C J 575 : (1966) M L J (Crl) 355 : (1966) 1 S C R 284 : A I R 1966 S C 197

2 (1966) 2 S C J 161 : (1965) 3 S C R 71 : A I R 1966 S C 142.

exercise of the extraordinary jurisdiction under Article 226. It was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of import and, therefore, exempt from tax. It was urged on behalf of the assessee that they would have had to deposit sales tax, while filing an appeal. Even if this is so, does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under Article 226, something going to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act."

The cases before us have got complicated on the merits by reason of the confessions and the resultant rather involved orders of the Director. An examination would be required in each case whether the confession has been accepted as true or not. If it is only a question of quantum of penalty, that is not normally a matter for consideration by this Court in writ jurisdiction If in any particular case we are convinced that if the applicant should be compelled to follow the remedy by way of appeal, palpable injustice may be done to him, the case may call for interference here. Where the error or illegality is so patent and obstrusive as to touch the conscience of this Court, interference would be called for here and now, notwithstanding the availability of remedy by way of appeal. If the penalty levied, in any case, is so heavy and it is clear that the penalty would break the applicant and that he would not be able to deposit the penalty amount and prosecute the appeal, the case may, if other circumstances warrant and *certiorari* would be appropriate, call for exercise of discretion in favour of the applicant. The applicants here *ex facie*, on their own showing, have violated the law and they are seeking to escape from the penalty imposed Their call for justice from midstream should be heeded if otherwise they will sink But, if they are not weighed down by the penalty and if we feel that they can safely cross the stream and reach the prescribed forum where relief may be had, we would hesitate to *pollute the pure fountain of justice* by going out of the way.

I have indicated in broad outline the general principles on which the cases before us will have to be considered and discretion exercised For the exercise of discretionary jurisdiction it is neither feasible nor desirable to rigidly lay down in advance rules that should govern the discretion Then it will cease to be discretionary. One safe and permanent rule is to be perpetually aware that the discretion has to be exercised judicially, judiciously and with reason. I have dealt only with two of the important questions which arise for consideration in these cases. While I am in agreement on both the aspects with the ultimate conclusion arrived at by my Lord the Chief Justice, I might have in my reasoning followed a more zigzag path. My Lord the Chief Justice has dealt *in extenso* with certain other features common to all the cases and as regards these matters I am in entire agreement. All the cases will now have to be considered individually in the light of the preliminary judgments.

V.M.K. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE M. NATESAN.

Kalyanasundara Nadar and another . *Appellants**

v.

Muthuraman *Respondent.*

Master and servant—Specific Relief Act, section 21 (b)—Wrongful termination of servants' services—Relationship between master and servant contractual and not statutory—Rights of dismissed servant—Whether entitled to a declaration that he continues in service and for reinstatement—Damages for breach of contract of service—Measure of—Principles.

If the service is contractual and there are no statutory regulations which would govern the service, any termination not in accordance with the contract would be a breach of contract Whether there has been termination or not is a matter for inference from circumstances If there is repudiation of the contract between the parties, it would be a case of wrongful termination of the service and the person aggrieved in such a case would be entitled only to damages

Whenever there is termination of service a distinction has been drawn between cases where the relationship between the master and servant is governed by contractual obligations and cases where the relationship is governed by statutory obligations The remedies of an aggrieved party would vary as the breach is of the one or the other The distinction is one on principles In the case of breach of contractual obligation a party may either treat the contract as broken and sue for damages or may refuse to accept the repudiation of the contractual obligations as a breach discharging the contract, treat the contrct as alive for performance and sue for specific performance of it. But the law must permit specific performance of the contract Contracts are not always specifically enforceable In a case of employment between master and servant section 21 (*b*) of the Specific Relief Act would make the remedy by way of specific performance of the contract unavailable In such cases the remedy would be only damages. But where an employment is governed by statutory obligations and terminable only in the manner provided by the statute, there could be no valid or effective termination of the contract, unless the procedure prescribed by the statute is complied with by the party intending to terminate the contract The contract would otherwise, in law, continue to subsist between the parties. The action which terminated the contract not being in accordance with the statute would be n ll and void They are cases of *ultra vires* acts properly so called In such a case the servant may be entitled at the discretion of the Court to a declaration that the termination is null and void, and that he continues in the employment of the master It is only when termination of service is challenged on the ground that there is breach of statutory obligations and the action terminating the service as *ultra vires*, the suit cannot be said to be one for enforcing a contract of personal service. The special circumstance which may permit of a declaration is either the violation of statutory rules and regulations in the matter of termination or constitutional provisions.

On facts held, that the action of the management amounts to a wrongful dismissal and repudiation of the contract and that there can be no question of any *ultra vires* act or of the act of termination of services being a nullity. There is no statute prescribing or circumscribing the manner in which the services should be terminated by the management. The plaintiff can have neither a declaration that he continues in the service of the school nor an order for reinstatement in service, but, there can, however, be a declaration that the plaintiff's services were wrongfully terminated.

Regarding the quantum of damages, applying the principles laid down in *Buckham v. Drake*, (1849) 2 H L C. 579 and in *Tanjore Permannat B nk Ltd.* v. *Munuswami*, I L.R. 1964 (1) Mad. 434, it was held, that the amount fixed by the lower Courts was not excessive.

*S A No 1836 of 1963. 1st April, 1967.

Appeal against the decree of the Subordinate Judge, Tuticorin, in Appeal Suit No 185 of 1962, preferred against the decree of the District Munsif of Srivaikuntam in Original Suit No 245 of 1961.

K. Hariharan, for Appellants.

V. Shanmugham, for Respondent

The Court delivered the following

JUDGMENT —The manager and correspondent of the Asoka Vidyalayam Higher Elementary School, Kachinavilai, and the school represented by him are appellants in this second appeal The appeal arises out of an action by the respondent herein, a higher grade trained teacher and permanent employee of the school whose services were terminated by the management The respondent as plaintiff averred in his plaint that the order terminating his services was illegal, unjust and arbitrary and prayed *inter alia* for a declaration that he continued or must be deemed to continue as the assistant teacher of the school, for his re nstatement as a teach r and for a money decree directing the management to pay him the salary and allowances attached to the post which had accrued The learned District Munsif, Servaikuntam, decreed the suit as prayed for giving a declaration that the plaintiff continues or must be deemed to continue as an assistant teacher of the school and consequently a mandatory injunction directing the defendants to reinstate the plaintiff as an assistant teacher He assessed the damages for the period from 1st October, 1959, to 1st June, 1961, at the sum of Rs 1,472 and granted a money decree for the said amount On appeal the learned Subordinate Judge of Tuticorin confirmed the decree

The main defence for the management on the merits of the case was, that the plaintiff voluntarily left the service of his own accord on 30th September, 1959, and that the management under the special circumstances of the case even desisted from insisting on a three months' notice in accordance with the rules which govern the service It was stated that having got himself relieved from the service at his own request, he again approached the defendants for re-employment and when this was turned down he came out with a case that his services were terminated wrongfully. The service register of the plaintiff contains an entry that the plaintiff was relieved on 30th September, 1959, at his own request. The plaintiff's signature may be seen on the page and may be related to the entry. The plaintiff's case with reference to this entry and his signature thereon was, that his signature was obtained with reference to an entry on the same page in an earlier column relating to an increment awarded to him, and that the entry relating to termination of his services at his own request was a subsequent interpolation, behind his back It is his case that a fraud has been played upon him by the management The plaintiff was employed in the school as a permanent teacher on 1st June, 1957 According to him when on 30th September, 1959, he was informed by the new headmaster of the school that his services had been terminated with that date and that he need not attend the school from and after 1st October, 1959, he immediately sent an appeal to the District Educational Officer, Tirunelveli South, complaining of the improper termination of his services While the District Educational Officer dismissed the plaintiff's appeal on further appeal the Divisional Inspector of Schools, Madurai, set aside the order of the District Educational Officer and directed the management to reinstate the plaintiff As the defendants in spite of the order of the Divisional Inspector of Schools passed on 17th September, 1960, failed to reinstate the plaintiff, after repeated demands he filed the suit out of which this second appeal arises on 23rd June, 1960

The plaintiff does not rest his case on the order of the Divisional Inspector of Schools directing the management to reinstate him It is conceded on both sides that the order is purely directory and cannot be enforced by a suit. As pointed out by Anantanarayanan, J., (as he then was) in *Ramaswami* v *State of Madras*[1], the only

1. (1962) 1 M L J 269

penalty the management will have to face by not giving effect to the order, may be the withdrawal of recognition or of financial aid by the State. On the merits the Courts below have accepted the plaintiff's case and held that the broad probabilities and the subsequent conduct of the parties as borne out by the immediate step the plaintiff had taken to seek redress clearly esatblished that the plaintiff had affixed his signature only in proof of his knowledge of one event namely, the grant of an increment with effect from 1st June, 1959 and not in acknowledgment of correctness of the entry relating to termination of his services with effect from the evening of 30th September, 1959. This finding is purely one of fact and is not open to challenge in second appeal. It is manifest that the management has played a fraud on the teacher. The management had the custody of his service register and behind his back having taken his signature for one purpose, they had interpolated in the register that he was relieved from his service at his own request. The effect of the entry would not be to terminate his service. Fraud vitiates the action and it must be deemed to be *non est* and a nullity But the entry is only evidence of the termination There is evidence that the plaintiff was refused permission to attend to his service on 1st October, 1959 Even on 30th September, 1959 he had been informed that his services were terminated from that date The plaint proceeds on the basis that there was an illegal and arbitrary termination of his service on 30th September, 1959 On this state of facts, the contention now urged before me in second appeal on behalf of the appellants is that the relationship between the parties being contractual, there could be no mandatory injunction for reinstatement nor could there be a declaration granted that the plaintiff continues in the service of the defendants It is contended that at the most, if the termination of his services was wrongful, the plaintiff would be entitled to claim damages, and that on the facts of the case he would be entitled to just three months' salary as damages. The argument in this form had been addressed even in the Courts below but it was overruled The Courts below would hold that in the circumstances the purported termination is no termination at all

It is not contended for the plaintiff that there are statutory rules or regulations governing the employment in question. It is not argued that the relationship between the parties is not contractual The service register does contain certain rules in the matter of termination of service Rule (iii) provides that no teacher shall ordinarily leave a school without giving three months' notice to the management and no management shall dispense with the services of a teacher without giving three months' notice to him except for adequate disciplinary reasons approved by the District Educational Officer. In *Elizebeth Rajagopalan* v *Athiya Ghani* (Second Appeal No 1713 of 1962), Ramamurti J, points out that having regard to the fact that practically all the schools receive financial aid in the form of grants from the State Government, the management with a view to secure and maintain grants from the Government, would be following rule 13 of rules relating to Elementary Schools whenever they take action against any member of the staff The learned Judge further points out that in the service registers of the members of the staff who joined service later, rule 13 framed by the Government has been specifically incorporated, and that there is no justification for making any distinction between one shcool and another in the matter of tenure and conditions of service of the members of the staff The learned Judge referring to these aspects of the matter observes that it is quite possible to draw the inference that the school authorities and the members of the staff impliedly accepted rule 13 as governing the conditions of service However, no final opinion was given in the matter and the learned Judge proceeded to consider the case on the condition of servie set forth in the register The condition therein considered is identical with the condition found in the service register of the present plaintiff On the facts of the case it was held that the stage had not been reached when it could be postulated in terms and conditions of service that the services had been validly terminated for adequate disciplinary reasons approved by the District Educational Officer. There is no question in the present case that the services of the plaintiff had not been terminated. As already stated the plaint proceeds on the basis of a termination the

contention, however, being that the termination is illegal and *non est*. If the service is contractual and there are no statutory regulations which would govern the service, any termination not in accordance with the contract would be a breach of contract. Whether there has been termination or not is a matter for inference from circumstances If there is repudiation of the contract between the parties, it would be a case of wrongful termination of the service and the person arggrieved in such a case would be entitled only to damages We may in the present case ignore the fraudulent entry as *non est* But the management has refused to continue the teacher in service on the agreed terms of the employment This amounts to a wrongful dismissal and repudiation of the cont act. In *Rubel Bronze and Metal Company and Vos, In re*[1], it is stated :

> " Dismissal may be effected by conduct as well as words A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract of employment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract "

In the instant case the parties have proceeded on the basis of termination of service and the validity of the decree now impugned must be examined on that assumption. Clearly the management in this case on 30th September, 1959, repudiated the contract of servic and forbade the teacher from continuing his service. It is their case that he voluntarily got himself relieved of the post. That has been found against But the fact remains that the management treated the services of the plaintiff as terminated, and so informed the plaintiff There was a *de facto* termination of his services, he was excluded from taking his place among the staff and prevented from working as a teacher True the exclusion was wrongful a clear case of wrongful termination of services

The question is whether in such a case there could be a declaration and a decree for reinstatement as now provided For the appellants reliance is placed on *S R Tewari* v. *District Board, Agra*[2], where it is said .

> " Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ Similarly under the industrial law jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act, the body has acted in breach of a mandatory obligation imposed by statute even if by, making the declaration the body is compelled to do something which it does not desire to do . . . .
>
> It must be pointed out that the powers of a statutory body are always subject to the statute which h s constituted it, and must be exercised consistently with the statute and the Courts have, in appropriate cases, the power to declare on action of the body illegal or *ultra vires*, even if the action relates to determination of employment of a servant."

It is not the case that there is any statutory or constitutional service guarantee in the instant case. The relationship between the plaintiff and the management is purely contractual. The educational rules which may govern the service of a teacher had

1. L.R. (1918) 1 K.B. 315, 323. 2. (1964) 2 S.C.J. 300 : A.I.R. 1964. S.C. 1680, 1682.

been repeatedly held to be administrative in character and not enforceable statutorily See *Sampoornam* v. *The Divisional Inspector of Schools*[1] and *Gunabushanam* v. *Manager and Correspondent*[2]. The plaintiff did not occupy any special position, which made the relationship other than contractual, and industrial labour law has no application.

Whenever there is termination of services a distinction has been drawn between cases where the relationship between the master and servant is governed by contractual obligations and cases where the relationship is governed by statutory obligation. The remedies of an aggrieved party would vary as the breach is of the one or the other. The distinction is one on principles. In the case of breach of contractual obligations a party may either treat the contract as broken and sue for damages or may refuse to accept the repudiation of the contractual obligations as a breach discharging the contract, treat the contract as alive for performance and sue for specific performance of it. But the law must permit specific performances of the contract. Contracts are not always specifically enforceable For instance in a case of employment between master and servant section 21 (*b*) of the Specific Relief Act would make the remedy by way of specific performance of the contract unavailable. In such cases the remedy would be only damages But where an employment is governed by statutory obligations and terminable only in the manner provided by the statute, there could be no valid or effective termination of the contract, unless the procedure prescribed by the statute is complied with by the party intending to terminate the contract. The contract would otherwise, in law, continue to subsist between the parties. The action which terminated the contract not being in accordance with the statute would be null and void They are cases of *ultra vires* acts properly so called In such a case the servant may be entitled at the discretion of the Court to a declaration that the termination is null and void, and that he continues in the employment of the master

In *Dr S Dutt* v *University of Delhi*[3], the respondent before the Supreme Court, the University of Delhi, terminated the services of the appellant who was a Professor of Chemistry in that University There was an award in the matter and the validity of the award came up for consideration before the Supreme Court. With reference to the provision in the award the High Court took the view that the contract of service between the appellant and the respondent was a contract of personal service, that, the award had the effect of specifically enforcing such contract of personal service, and that, therefore, it offended section 21 (*b*) of the Specific Relief Act Before the Supreme Court it was urged for the appellant that the declaration that the appellant continued in service under the university inspite of his dismissal by the latter provided in the award was a declaration which the law permitted to be made, and that, therefore, there was no error on the face of the award as looked upon by the High Court. Reliance was placed for the appellant on the decision of the Judicial Committee in *High Commissioner for India* v *I M Lall*[4], where the Judicial Committee had in fact made such declaration. Repelling the argument of the appellant that such declaration would be valid, the Supreme Court said (at page 1054) :

> "That *Lal's case*[4], was not a case based on a contract of personal service. Indeed the contract of the respondent in that case provided that he service was "to continue during the pleasure of His Majesty, His Heirs and Successors, to be signified under the hand of the Secretary of State for India ". The respondent had been dismissed by an order made under the hand of the Secretary of State for India, and as he was liable to be dismissed at the pleasure of the Crown, he could base no complaint against his dismissal on the contract of service and did not, in fact, do so He founded this suit on the claims that his dismissal by the Crown from the Indian Civil Service of which he was a member, was void and of no effect as certain mandatory provisions of the Government of India Act, 1935, had

1 W P No 1063 of 1952
2 W P No 111 of 1960
3 (1959) S C J 78 : (1959) S C R. 1236 : A I R 1958 S C 1050
4 (1948) F C R 44 L R 75 I A 225 : (1948) F L J 23 : (1948) 2 M L J 55

not been complied with. The Judicial Committee accepted this claim and thereupon made the declaration that the purported dismissal of the respondent was void and inoperative and he remained a member of the Service at the date of the institution of his suit. The declaration did not enforce a contract of personal service but proceeded on the basis that the dismissal could only be effected in terms of the statute and as that had not been done, it was a nullity, from which the result followed that the respondent had continued in service. All that the Judicial Committee did in this case was to make a declaration of a statutory invalidity of an act, which is a thing entirely different from enforcing a contract of personal service."

The aforesaid observations of the Supreme Court clearly show that it is only when termination of service is challenged on the ground that there is breach of statutory obligations and the action terminating the service as *ultra vires*, the suit cannot be said to be one for enforcing a contract of personal service. The Supreme Court in this case clearly brings out the distinction between a breach of contractual obligation and violation of a statutory obligation in terminating the services of an employee. Earlier their Lordships of the Supreme Court observed (at page 1054):

"The award held that the appellant had been dismissed wrongfully and *mala fide*. Now, it is not consequential to such a finding that the dismissal was of no effect, for a wrongful and *mala fide* dismissal is none the less an effective dismissal though it may give rise to a claim in damages. The award, no doubt, also said that the dismissal of the appellant was *ultra vires* but as well be seen later, it did not thereby hold the act of dismissal to be a nullity and, therefore, of no effect."

In the instant case there can be no question of any *ultra vires* act or of the act of termination of service being a nullity. There is no statute prescribing and circumscribing the manner in which the services should be terminated by the management. In *Vine* v. *National Dock Labour Board*[1], Viscount Kilmuir, L.C., said :

"Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which by statute, that status conferred on him."

In that case the plaintiff was a dock labourer employed in the reserve pool by the National Dock Labour Board, the defendants, in the case, under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947. The plaintiff's dismissal was held invalid, as the Local Dock Labour Board had no power under the scheme to delegate to a disciplinary committee their disciplinary powers given by clause 16 of the order. Lord Keth observed:

"This is not a straightforward relationship of master and servant. Normally and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

In *Barber* v. *Manchester Regional Hospital Board*[2], referring to *Vine* v. *National Dock Labour Board*[1], it was observed·

"There the plaintiff was working under a statutory scheme of employment, and clearly in those circumstances all the Lords of Appeal who dealt with the case in the House of Lords took the view that it could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more In those circumstances I feel bound to apply the general rule stated by Lord Keith and to reach the conclusion here that the plaintiff's only remedy against the board is the recovery of damages."

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1. (1957) 2 W.L.R. 106, 112, 118. 2. (1958) 1 W.L.R 181, 196.

Reference may also be made to *Francis* v. *Kuala Lumpur Councillors*[1], a decision of the Privy Council, where Lord Morris observed.

" In their Lordship's view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principles of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court. In their Lordship's view there are no circumstances in the present case which would make it either just or proper to make such a declaration."

The special circumstance which may permit of a declaration as seen from the case law is either the violation of statutory rules and regulations in the matter of termination or Constitutional provisions In *Ridge* v. *Baldwin*[2], a case of dismissal of a chief constable by the Watch Committee, it was said:

" The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not full within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

In *Vidyodaya University* v. *Silva*[3], a case from Ceylon the Privy Council again restated the principle with reference to a University professor, quoting the above passage in *Ridge* v. *Baldwin*[2]. In support of his position learned Counsel for the appellants cited also *Mohanakrishnaiah Naidu* v *National Bank of India*[4], *Krishna Rao* v. *Anjaneyulu*[5], *G. T. M. Committee* v *Narasaiah*[6], *Surendra Nath* v. *I. A. Corporation*[7], *Tata Chemicals Ltd.* v. *Kailash*[8] and *Ram Babu* v. *Divisional Manager, L I.C.*[9] In the last case referred to above, it is observed:

" In other words, the general law of master and servant to the effect that the servant is at the pleasure of the master will stand in every case except in those where the same has been abrogated either by a statutory provision or by special contract. In the case of Government servants to whom Article 311 of the Constitution is applicable and in those cases where the provisions of the Industrial Disputes Act are applicable the general law that a servant is at the pleasure of the master stands abrogated to the extent to which the provisions of the Constitution or the Industrial Disputes Act provide.

The petitioner's case as I have already said above cannot be governed by the provisions of the Constitution and Article 311 would not apply to his case. It is also clear that the provisions of the Industrial Disputes Act will not apply to his case and it is equally clear that neither there is any statutory provision nor a contract which curtails, modifies or takes away the power of the Corporation to dismiss the petitioner at pleasure and the petitioner cannot claim for himself a tenure of " good behaviour." For these reasons I am of the opinion that no writ of *mandamus* can be issued in the circumstances of the present case."

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1 (1962) 1 W L R 1411, 1417
2 L R. (1964) A C 40, 65
3. (1964) 3 All E R 865 (P C)
4. (1954) 1 L L J 136
5. (1953) 1 M.L.J. 781 . A.I R 1954 Mad. 113.
6 (1965) 1 An W R 351 . A I R. 1965 A P. 266.
7 A I R 1966 Cal 272.
8 A I R 1964 Guj 265
9 A I R. 1961 All 502, 505.

In *S. R. Tewari* v. *District Board, Agra*[1], the Supreme Court referred to this case *Ram Babu* v. *Divisional Manager, L.I.C*[2], with the following observations:

> " In *Ram Babu Rathaur's case*[2], the Court had to consider the question whether an employee of the Life Insurance Corporation whose employment was terminated could claim a writ of *mandamus* restoring him to the service of the Corporation, or a writ of *certiorari* quashing the proceeding of the Corporation. The Corporation is an autonomous body and is not a department of the State, and the relation between the Corporation and its employees is governed by contract, and no statutory obligation is imposed upon the Corporation in that behalf. The Court was therefore right in holding that the relationship between the employee and the Corporation had to be determined in the absence of any statutory provision or a special contract, by the general law of master and servant."

In view of the aforesaid observations of the Supreme Court on *Ram Babu Rathaur's case*[2], there can be the least hesitation in holding that in the present case the plaintiff can have neither a declaration that he continues in the service of the school nor an order for reinstatement in service. No decision contra has been placed before me for the plaintiff Learned Counsel for the plaintiff-respondent referred to the decision of this Court in *Sarangapani* v. *K. H. S. E. Society*[3] The decision is by a Division Bench But the question now under consideration was not the subject-matter of any discussion In that case the management of a school terminated the services of a teacher and the teacher preferred an appeal to the Director of Public Instruction under clause 10 of the agreement between him and the school authorities. The Director of Public Instruction passed an order holding that the order terminating the services of the teacher was null and void and that the teacher must be reinstated in service forthwith Rajagopalan, J., before whom the writ petition came in the first instance held that the order of the Director of Public Instruction was vitiated, and on appeal his view of the learned Judge was notaccepted The Division Bench restored the order of the Director of Public Instruction. Whether the order of Director of Public Instruction directing reinstatement of the teacher in the school service could be enforced by the teacher against the management and whether a civil Court can pass such an order was not the subject of consideration in the case. This Court merely restored the order of the Director of Public Instruction as not vitiated by any irregularity or illegality. It did not issue any writ of *mand-mus*, nor did it grant any declaration There was no enforceable order of reinstatement in that case by the civil Court. Therefore, the decision cannot be an authority for the contention that there could be specific enforcement of a simple contract of employment The other two decisions cited on behalf of the plaintiff *The Divisional Inspector of Schools* v *Ramachandran*[4], and *Elizabeth Rajagopal* v *Athiya Gani*[5], also will not help the plaintiff In neither of the cases did the question come up for consideration. In the former case the learned Judge Ramamurti, J , particularly points out that in that case it was not claimed that the authorities of the school wanted to put an end to the services of the plaintiff on any ground whatever other than age, and that the controversy related only to the correct date of birth of the plaintiff. The declaration originally sought for in that case was the correct date of birth of the teacher and at the time when the plaintiff instituted the suit, he was still in service There was no question of termination of the services of the plaintiff at that time and the proposition the learned Judge had to consider was whether the plaintiff could claim a mere declaration to establish the correct date of birth without further consequential relief In the latter case *Elizabeth Rajagopal* v *Athiya Gani*[5] no doubt there was a declaration by the trial Court, that the plaintiff continued in service of the school. But mandatory injunction for reinstatement in service was not granted There was only a decree for money, being the salary due to the plaintiff On appeal by the management, the suit was dismissed in its entirety and this Court in second appeal restored the decree of the trial Court. I have

1 (1964) 2 S C J 300 : A I R. 1964 S.C. 1680, 1683
2. A.I R. 1961 All 502.
3 (1957) 2 M L J 24 : A I R 1957 Mad 561.
4. S A. No 309 of 1965.
5. S.A No 1713 of 1962.

already referred to the basis of the decision in that case. The charges levelled against the plaintiff were not investigated and the learned Judge observed that the matter was still *sub judice* though the District Judge had expressed his opinion againt the teacher and in favour of the management when he did not have all the materials before him. There was no dispute on the quantum of damages and the learned Judge referred to the money portion of the claim as damages. In that case this Court only restored the decision of the trial Court There was no discussion whether a declratory decree as now claimed could be given. The points raised before me in the form were not raised before the learned Judge in that case.

From the above discussion it follows that the provisions in the decree declaring that the plaintiff continues as a teacher in the school and directing the defendants to reinstate the plaintiff as an assistant teacher in the school have to go. To retain these provisions is to specifically enforce the contract of service. There can, however, be a declaration that the plaintiff's services were wrongfully terminated It follows from the finding, that the plaintiff was not relieved from the service on his own request and that the termination of the plaintiff's services was not in accordance with the contract. It is this finding which makes the management liable for breach of contract of service, entitling the plaintiff to damages The declaration that would go against law in a case like the present, is a declaration that the termination of service is a nullity, and the plaintiff continued in service notwithstanding a purported termination.

The management questions also the money portion of the decree. But here the decree for Rs. 1,472 has not been awarded merely as arrears of salary and allowances accrued, but as damages. The appellants would contend that the plaintiff at the most would be entitled to three months salary. But in this case the plaintiff's service register was not handed over to him immediately. Under rule 13 (1) (*i*) of the rules relating to elementary schools every teacher working in a school under private management except schools under Railway management shall possess a Teacher's Service Register issued by the District Educational Officer. For the plaintiff to join in any other school he would have to produce his service register. The plaintiff got back his service register only in February, 1961. His services had been terminated on 30th September, 1959 in the most fraudulent manner behind his back, the management taking advantage of their custody of the service register which is the property of the plaintiff. The Educational Department had allowed the appeal of the Teacher and directed his reinstatement. The teacher might have normally expected his being re-entertained by the same school, as otherwise the school would incur the penalty of forfeiting the State grant. As stated already the teacher's certificate was received by the plaintiff only in February, 1961, about the close of the school year and normally it would take some time for him to find employment in some other school. In *Beckham* v. *Drake*[1], Erle, J., observed :

> " The measure of damages..............is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained "

In *Tanjore Permanent Bank Ltd.* v. *Munuswami*[2], Veeraswami, J, set out the principles for assessment of damages in the case of wrongful dismissal between master and servant thus :

> "Where an employment is contractual and the terms of which provide or do not provide for the manner of termination of service, the principles for assessing damages to be awarded for wrongful dismissal are not in doubt The basis of damages in such cases is breach of contract of service either because the stipulated notice was not given for termination or in the process of termination, the requisite procedure has not been followed. Where the contract provides for the manner of termination, as for instance, a month's notice or a month's pay in lieu of such

1. (1849) 2 H L C. 579, 606, 608. 2 I L R (1964) 1 Mad 434, 435

notice, normally that will be the measure of damages But in addition to that, on account of the fact that the employee has been wrongfully dismissed from service the time that may probably be taken and the reasonable chance of getting re-employment should be kept in view Where the contract did not provide for the manner of termination a reasonable period of notice or pay in lieu of such notice would be a basis together with the additional factor I have mentioned for assessing damages There may be exceptional cases where other circumstances may well enter into the computation of the quantum of damages, as for instance, employment in a specialised department in which case alternative employment will be difficult to get."

In the light of the above principles the sum of Rs. 1,472 awarded as damages for the period from 1st October, 1959 to 1st June, 1961, as the salary and allowances which the teacher would have received if he had continued in service cannot be said to be excessive. It may be that the appellate Court has regarded the amount as arrears of pay in the view it has taken that there was no termination of service at all. But ultimately the appellate Court has only confirmed the decree of the trial Court which as stated above has assessed the figure only as damages. It cannot be said that the trial Court erred on principle in assessing the damages at the said figure. It is in perfect accord with the principles found enunciated in decided cases.

In the result clause 3 of the decree of the trial Court confirmed by the appellate Court awarding the plaintiff a sum of Rs. 1,472 as damages will stand confirmed. Clauses 1 and 2 of the decree of the trial Court shall stand deleted. A declaration will be given that the plaintiff's services were not terminated by the defendants rightly and in accordance with law. The second appeal is allowed to the extent above indicated and dismissed in other respects. On the question of costs, having regard to the disreputable conduct of the management the plaintiff would be entitled to his full costs throughout. No leave.

S.V.J. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Gopala Konar .. *Appellant* *

v.

Subramania Asari and another .. *Respondents*

Civil Procedure Code (V of 1908), *sections* 2 (2), 47, 96 *and Order* 21, *rule* 58—*Party impleaded, exonerated but not struck off the record—Effect—Suit against son as the legal representative—Exonerated but not struck off the record*—Ex parte *decree against the other defendant—Execution of decree—Attachment of property—Claim preferred by the son upheld by the Court—Appeal to the District Court by the decree holder—Competency—Practice.*

Father and mother sold a property to *T*, while the son sold the same property to *P*. *T*. filed a suit for damages for breach of covenant of title, against the mother and (as the father was dead) the son, impleading him as the legal representative. Subsequently the son was exonerated but his name was not struck off the record. In execution of the *ex parte* decree, the decree holder attached certain properties The son preferred a claim, under section 47 and Order 21, rule 58 and the same was allowed. The District Court refused to entertain an appeal against the order. Hence the second appeal.

Held: The appeal to the District Court is competent.

If a party's name is struck off the record, he no longer remains a party and section 47 of the Code will not apply, but if his name is not struck off and he is only exonerated from the suit, the question whether he continues to be a party for the purposes of section 47 would depend on the circumstances in which he was impleaded in the suit.

* A.A.A.O. No 111 of 1964. 9th January, 1968.

Where a party ought not to have been impleaded at all but still had been impleaded and was subsequently exonerated, the duty of the Court was to strike off his name from the record, and if instead of adopting the correct procedure, the Court merely exonerated him, it would not matter and his name must be deemed to have been struck off the record.

But where a claim was made against a party on some basis, but the plaintiff abandoned his claim as against that party and the party was exonerated, the party would still be a defendant in the suit for the purpose of section 47 of the Code.

On facts,

The son was impleaded as the legal representative having the assets of his father liable to satisfy the claims. Therefore he has been properly impleaded in the suit and section 47 read with section 2 (2) of the Code render the decision of the District Munsif, a decree, which is appealable to the District Court.

Abdul Sac v. *Sundara Mudaliar*, (1930) 59 M L J. 932: I.L.R. 54 Mad. 81 (F.B.), referred.

Appeal against the Order of the District Court, Tiruchirapalli, dated 22nd February, 1964 and made in S. R. No. 38 dated 2nd January, 1964 (E.A. No. 81 of 1963 in O.S. No. 61 of 1960 on the file of the Court of the District Munsif, Ariyalur).

K.N. Balasubramaniam, for Appellant.

K. S. Naidu, *R. Vijaiyan* and *A. Venkatachalam*, for Respondent.

The Court made the following

ORDER.—The question involved is, whether an appeal lay to the District Court of Tiruchirapalli against the order of the District Munsif of Ariyalur dated 12th November, 1963 in E.A. No. 81 of 1963 in O.S. No. 61 of 1960. The facts are these. One Thangamuthu Konar purchased a house for Rs. 500 from one Ponnuswami Asari and his wife Pappammal on 21st July, 1953. Subramania Asari, son of Ponnuswami Asari, however, claimed the property to be his and sold it to one Paramasiva Udayar. Paramasiva Udayar removed the superstructure of the house. Thangamuthu Konar defended his purchase but was unsuccessful. Thereupon, he filed O.S. No. 61 of 1960 for damages for breach of covenant of title contained in the sale deed dated 21st July, 1953. He impleaded Pappammal as the first defendant in that suit, as she was one of the vendors. Ponnuswami Asari was by then dead. Thangamuthu Konar therefore impleaded Subramania Asari (as 2nd respondent) as the legal representative of Ponnuswami Asari, liable to satisfy his claim out of the assets of Ponnuswami Asari, if any, in his hands Subsequently, however, Subramania Asari was exonerated but his name was not struck off the record A decree was passed on 21st October, 1960, for Rs. 584-69, the first defendant allowing the suit to proceed *ex parte*.

Thangamuthu Konar assigned the decree to one Gopal Konar, who levied execution and attached some house belonging to Pappammal. Subramania Asari intervened with a claim petition, E A. No. 81 of 1963, claiming the property as his own His petition itself purported to be under Order 21, rule 58 and section 47, Civil Procedure Code His claim was allowed by the learned District Munsif by his order dated 12th November, 1963. Against that Gopala Konar filed an appeal to the District Court, but the District Court held that no appeal lay and that the remedy of Gopala Konar was only a suit under Order 21, rule 63, Civil Procedure Code. Gopala Konar urged that the matter was one under section 47, Civil Procedure Code, and therefore an appeal lay. But that contention was rejected by the learned District Judge. This second appeal has been preferred against the order of the learned District Judge.

The law on this point has been laid down in the Full Bench decision in *Abdul Sac* v. *Sundara Mudaliar*[1]. It is pointed out there that if a party's name is struck off the record, he no longer remains a party and section 47, Civil Procedure Code,

1. (1930) 59 M.L J 932: I.L.R. 54 Mad. 81 (F.B.).

will not apply, but if his name is not struck off and he is only exonerated from the suit, the question whether he continues to be a party for the purpose of section 47, Civil Procedure Code, would depend on the circumstances in which he was impleaded in the suit. Suppose, for instance, he ought not to have been made a party to the suit at all, but still had been impleaded and was subsequently exonerated, the duty of the Court was to strike off his name from the record, and if, instead of adopting the correct procedure, the Court merely exonerated him, it would not matter and his name must be deemed to have been struck off the record. In contrast to this will be a case where a claim was made against a party on some basis, but the plaintiff abandoned his claim as against that party and the party was exonerated. In such a case the party would still remain a defendant in the suit for the purpose of section 47, Civil Procedure Code. This is also made clear in the Explanation to section 47, Civil Procedure Code, which says

> "For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit."

The question, therefore, is why Subramania Asari was impleaded at all in the suit and why he was exonerated I have gone through the plaint in O S No 61 of 1960 a certified copy of which has been furnished by learned Counsel for the appellant Paragraphs 10, 11, 12 and 17 of the plaint show that Subramania Asari was impleaded on the footing that he was the legal representative of Ponnuswami Asari and had the assets of Ponnuswami Asari in his hands and was therefore liable to satisfy the claim of Thangamuthu Konar against the assets of Ponnuswami Asari. This is a case, therefore, where it cannot be said that he ought not to have been made a party to the suit at all. Sri K.S Naidu, learned Counsel for Subramania Asari, urges before me that the contention of Subramania Asari is that long before 21st July, 1953, there had been a partition between Ponnuswami Asari and Subramania Asari and therefore Subramania Asari had nothing to do with the claim of Thangamuthu Konar. But the partition could not put an end to his status as the heir and legal representative of his father Ponnuswami Asari on the latter's death, and it was on that footing he was impleaded in the suit. Merely because the plaintiff abandoned his claim against him, he would not cease to be a party to the suit. Hence, it is clear that section 47, Civil Procedure Code, applies and, as we have seen, even Subramania Asari quoted section 47 in his application and if section 47 applies, the decision of the learned District Munsif is a 'decree' under the definition in section 2 (2), Civil Procedure Code, and will be appealable as such under section 96, Civil Procedure Code. The learned District Judge was therefore wrong in refusing to entertain the appeal. His order is set aside and he is directed to admit the appeal and dispose of it according to law. No order as to costs.

V.S. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

P. P. Krishnan .. *Appellant**

v

J. Thailambal .. *Respondent.*

Hindu Marriage Act (XXV of 1955), sections 24 and 25—Petition for nullity of marriage by husband—Order under section 24 for interim maintenance and expenses made in favour of wife—If becomes inexecutable by withdrawal of petition for annulment by husband.

Section 24 of the Hindu Marriage Act contains no limitation that an order for interim maintenance and expenses made thereunder will cease to have force if the husband against whom the order is passed chooses to withdraw the proceedings for nullity of marriage initiated by him. When the husband chooses to

* A.A.A O No 30 of 1965. 29th February, 1968.

drag the wife to the Court by filing a proceeding and if it is shown that the wife has no independent income, the husband must necessarily provide her with interim maintenance and the necessary expenses and he cannot be allowed to wipe out this liability after the order is passed by choosing to withdraw from the petition. His being allowed to do so would only amount to harrassment of the wife, for the expenses might have already been incurred by the wife.

Section 24 applies not merely to the respondent in the main petition but could also be invoked by the petitioner in the main petition itself, whether it be the wife or the husband When the provision is of such a far reaching character, it would defeat the purpose of the provision if the Court were to hold that the benefit of the section is to depend on the caprice of the petitioner in not choosing to proceed with the main petition.

Appeal against the order of the District Court, Madurai, in C M A. No. 19 of 1964—E.A. No. 237 of 1962 in O P No. 39 of 1958, Sub-Court, Dindigul.

A. Sundaram Ayyar, for Appellant.

K. S. Ramaratnam, for Respondent.

The Court delivered the following

JUDGMENT.—The facts giving rise to this appeal are these: The appellant Krishnan, and the respondent, Thailambal, were duly married according to Hindu rites. But, unfortunately, differences arose latterly. On 8th December, 1958, the husband filed O P. No. 39 of 1958 (Sub-Court, Dindigul) under section 12 of the Hindu Marriage Act, 1955 for declaring the marriage a nullity on the ground of alleged impotency of the respondent. During the pendency of the above petition the wife filed an application, I.A. No. 31 of 1959, on 23rd June, 1959 under section 24 of the Act for interim maintenance and expenses of the proceeding. Actually even before O P. No 39 of 1958 was filed, she had filed M.P. No. 324 of 1958 on 23rd August, 1958 under section 488, Criminal Procedure Code, before the Sub-Divisional Magistrate of Usilampatti. After filing O.P. No. 39 of 1958, the husband moved for a stay of the enquiry into that petition pending disposal of O.P. No. 39 of 1958. This application was rejected by the learned Magistrate He filed a Criminal Revision Case No. 167 of 1959 in this Court against that order. This Court granted stay of M.P. No. 324 of 1958 and allowed the wife to file an application for maintenance in O.P. No. 39 of 1958. It was thereafter that the wife filed I.A. No. 31 of 1959.

On 18th February, 1960, the trial Court *i.e.*, the learned Subordinate Judge, made an order in I A. No. 31 of 1959 directing the appellant herein to pay Rs. 50 per month for maintenance from the date of the petition and Rs. 250 towards expenses of the proceedings—as a condition precedent for the trial of the main petition, O P. No. 39 of 1958. The husband carried the matter in appeal in C.M.A. No. 13 of 1959 to the learned District Judge. The learned District Judge reduced the amount for the expenses to Rs. 200 and otherwise confirmed the order of the learned Subordinate Judge The above order was passed on 26th October, 1960. Thereafter on 24th November, 1960, the husband made an endorsement in O.P No. 39 of 1958 that he did not have the means to comply with the order for payment of maintenance and the expenses and that he was not pressing the original petition. The original petition was dismissed on 29th November, 1960.

M P. No. 324 of 1958 was renumbered as M C. No. 1 of 1959 and came on for enquiry before the Magistrate. On 9th March, 1961, the parties entered into a compromise by which the husband agreed to pay at Rs 32 per month from 9th March, 1961, the first of such payment being payable on 10th April, 1961. The husband says that he has been paying the amount ever since

The wife filed E A. No. 237 of 1962 in O P. No. 39 of 1958 on the file of the executing Court (Sub-Court, Dindigul) for recovery of a sum of Rs. 1,077-26 and for transferring the decree for execution to the Sub-Court at Ootacamund, where the appellant was employed. This amount was made up of Rs. 831-66, the main-

tenance ordered in I A. No 31 of 1959 and confirmed in C M A. No 13 of 1960 for the period 23rd June, 1959 to 24th November, 1960. Secondly, it included a sum of Rs. 200 being the expenses as ordered in C M.A. No. 13 of 1960. The remainder represented the costs of the execution.

The husband resisted E A. No. 237 of 1962 on the grounds—one, that the order passed on 18th February, 1960 in I.A No. 31 of 1959 and confirmed with modification in C M A. No. 13 of 1960 was not executable and ceased to have effect when the appellant made the endorsement on 24th November, 1960, that he was not pressing the O.P. and as a result the O.P. itself was dismissed. The contention is that the order was only meant as a condition precedent to the appellant having the benefit of proceeding with the trial of O P. No. 39 of 1958 and that when he did not choose to proceed with that matter, the order had no other efficacy. The second objection was that even if the above contention was not accepted, the parties, by entering into an arrangement or compromise on 9th March, 1961 in M.C. No. 1 of 1959 intended to abrogate the order for interim maintenance and expenses passed in I.A. No. 31 of 1959 and confirmed in C M A. No. 13 of 1960 with modification.

These contentions were rejected by the executing Court and, on appeal, by the learned District Judge. Hence this further appeal by the husband. In the appeal, the same two objections are repeated by the appellant's Counsel Sri A. Sundaram Iyer.

Section 24 of the Act reads:—

"Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable."

Section 28 of the Act says:—

"All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force; Provided that there shall be no appeal on the subject of costs only."

The terms of section 24 under which the order sought to be executed was passed, contain no limitation that the order will cease to have force if the husband against whom the order is passed chooses to withdraw the main petition Section 28 further enacts that the order passed under 24 can be enforced in like manner as a decree and order of the Court made in the exercise of the original jurisdiction In other words, it could be executed in the manner sought by the respondent. Section 28 therefore reinforces the view that the order passed for interim maintenance and expenses under section 24 could be enforced, notwithstanding the fact that the husband chooses to withdraw from the application.

The object underlying section 24 would also be defeated if the order under section 24 were to lose its efficacy on the husband choosing to withdraw from the petition of his own choice. The object underlying section 24 is to provide the wife with interim maintenance during the pendency of the proceeding and also with the necessary expenses for defending the proceedings. When the husband chooses to drag the wife to the Court by filing a proceeding and if it is shown that the wife has no independent income the husband must necessarily provide her with interim maintenance and the necessary expenses and he cannot be allowed to wipe out this liability after the order is passed by choosing to withdraw from the petition His being allowed to do so would only amount to harrassment of the wife, for the expenses might have already been incurred by the wife It may be noted further that section 24, as it is worded, applies not merely to the respondent in the main petition

but could also be invoked by the petitioner in the main petition itself, whether it be the wife or the husband It means that an indigent wife can bring a proceeding under the Act and claim interim maintenance and expenses from the husband if the husband is able to make provision thereof Conversely, an indigent husband can bring proceeding against the wife and get interim maintenance and expenses from the more prosperous wife. When the provision is of such a far reaching character, it would defeat the purpose of the provision if the Court were to hold that the benefit of the section is to depend on the caprice of the petitioner in not choosing to proceed with his petition.

The order under section 24 of the Act, will, no doubt, be current only during the pendency of the proceeding before the trial Court, but its efficacy cannot be otherwise destroyed on the ground that the main petition has been withdrawn by the petitioner.

There appears to be no decision so far, either way, on the question now under consideration, but the cases which have been brought to my notice contain observations which support the view which I have taken. In *Mahalingam Pillai* v. *Ambavalli*,[1] Ramaswami, J., with his characteristic thoroughness, if I may say so with respect, has exhaustively dealt with the case-law on the several aspect of the provisions of the Act, point (2) discussed by him related to alimony, interim alimony during the pendency of the proceeding and permanent alimony. At page 299 the learned Judge observes:

"The Special Marriage Act, 1954 in section 39, the Hindu Marriage Act in section 28 and the Madras Act VI of 1949 in section 5, provide that all orders made by the Court shall be enforced in the like manner as the decrees and orders of Court made in the exercise of the original civil jurisdiction are enforced and may be appealed from under the law for the time being in force."

The learned Judge further observes that section 28 of the Hindu Marriage Act, 1955, provides for execution of the orders of the Court and therefore orders granting alimony *pendente lite* could not only be executed by the wife, but when these payment are made condition precedent for the taking up of the trial of the petition and these orders are not complied with, the petition can be dismissed. In that case an order for interim maintenance had been passed in appeal by this Court but had been contumaciously disobeyed by the husband. It was however not made a condition precedent for the hearing of the appeal Hence the learned Judge directed that an opportunity should be given to the husband to pay up the arrears, or in the alternative the appeal would be dismissed.

In *Malkan Ram* v. *Krishna Kumar*[2], a Bench of the Punjab High Court held that section 28 of the Act would not prevent the Court from exercising its inherent power and staying the trial of the main petition if the order for interim maintenance and expenses is not obeyed It was recognised that section 28 enables the party to recover the amount by taking execution proceedings.

In *Mst. Mukan Kanwar* v. *Ajitchand*[3], it was merely held that the order passed under section 24 of the Act would have currency only during the proceeding in the trial Court and would not have effect in the appellate Court, but that the appellate Court should pass a fresh order under section 24 of the Act in view of section 107, Civil Procedure Code, (made applicable under section 21 of the Act). In *Dr. Tarlochan Singh* v. *Mohinder Kaur*[4], the same point was decided and in the course of the judgment, the learned Judge, Dua, J, points out that the order passed by the trial Court could be executed under section 28 of the Act and he relies on the Bench decision in *Malkan Ram* v *Krishan Kumar*.[2] In *Bhunohwar Prasad* v. *Dropata Bai*[5], it was recognised that the order under section 24 of the Act could be enforced in

1. (1966) 2 M L J. 289
2. A I R 1961 Punj 42.
3. I.L R (1960) Raj 1500 : A I R 1961 Raj 51.
4. I L R (1963) 1 Punj 74 : A I.R. 1963 Punj. 249.
5. A I R. 1963 Madh. Pra. 259.

execution under section 28 and further it was held that in addition the trial Court could stay the trial if the amount was not paid.

On behalf of the appellant, the decision of Veeraswami, J, in *Doraiswami* v. *Govindaswami*[1], was cited But that is not relevant for the point under discussion. In that case, interim stay of execution of a decree for possession was granted on certain terms. The terms were not complied with in full. Consequently, possession was taken. It was held that when the terms were not complied with, the interim stay ceased to have its force. There the interim stay ceased to have force because of its own terms and there was already the decree in favour of the respondent entitling the respondent to take possession Here in the instant case the order passed under section 24 of the Hindu Marriage Act does not contain any such limitation as an interim order of stay.

Chaudhari's Commentary of the Hindu Marriage Act, 1955 (1957 Edn.) under section 24 (note 11 at page 323) and Saxana's Commentary, 3rd Edition, under section 24 (note 3 at page 370) are also to the effect that the order under section 24 of the Act could be enforced in execution by virtue of section 21 of the Act

I therefore repel the first contention of Sri Sundaram Iyer that the order was not executable and ceased to have effect when the appellant withdrew the petition and the original petition was dismissed.

The second objection has no substance either Indeed, the intention of the parties must have been that the wife must have the benefit of the order already passed in I.A No. 31 of 1959, because, otherwise it is un-understandable that having filed the petition for maintenance, on 23rd October, 1968 itself, she agreed to give up all the benefit of the order she had secured in I.A. No. 31 of 1959 and was content to receive maintenance at the rate of Rs. 32 per month only from 9th March, 1961. The appeal may justly be characterised as frivolous and it is accordingly dismissed with costs.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

M. Rodgers .. *Petitioner**

v.

M. Prakash Rao Naidu .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (2) (ii) (a)—*Sub-letting—Application for eviction—Tenant of business premises—Leasing the machinery in the premises to another and taking rent—'Business run by the lessee—No share to the tenant in the business—If entails eviction.*

The tenant who was running the Press in the buildings (a business premises) with his machinery, stopped the business and his previous manager was running a Press as a lessee of the machinery. The petitioner-tenant had no share in that business. In an application for eviction on the ground of sub-letting.

Held, The tenant is liable to be evicted on the ground of sub-letting.

The machinery cannot be run unless it is placed in the premises where it is situate. So, the lessee of the machinery also gets the advantage of the use of the business premises also. Therefore the lease amount which the lessor receives should contain in it an element of rent for the building which is used to house the machinery as well as the rent for the use of the machinery. It is unbelievable that the lessor would take rent for the use of the machinery alone and not take any rent for the use of the business premises and agree to pay the rent himself.

1. AIR 1963 Mad 207.

*C.R.P. No. 2413 of 1967. 18th April, 1968.

It is not an answer under these circumstances against the charge of sub-letting to say that the lessor does not take anything separately from the lessee by was of rent for the building itself or that he himself is paying the rent to the landlord and sub-lessee is not paying the rent to the landlord.

Subbanna Sastry v. *Abdulla*, (1959) 2 M L J 25 (N.R.C.) and *Venkatarama Iyer* v *Renters Ltd.*, (1951) 2 M L.J. (N R C.) 57, referred

Petition under section 25 of Madras Act XVIII of 1960 praying the High Court to revise the order of the Court of the Third Judge, Court of Small Causes, Madras, dated 6th October, 1967 and made in M P No 735 of 1967, in H. R A No 708 of 1966 (H. R. C. No 3998 of 1965) on the file of the Court of the Second Additional Rent Controller, Madras.

M. Krishnaswamy, for Petitioner

T. R. Srinivasa Ayyar, for Respondents.

The Court delivered the following

JUDGMENT —This is a petition under section 25 of the Madras Buildings (Lease and Rent Control) Act by a tenant, who has been ordered to be evicted at the instance of the landlord in pursuance of an order in H R.A. No. 708 of 1966 filed by the landlord against the dismissal of his application for eviction of the tenant by the learned Rent Controller The eviction was sought for on two grounds, wilful default in payment of rent and subletting The Rent Controller found against the landlord on both the grounds But the learned appellate Judge has taken a different view on both the grounds As any one of the grounds is sufficient to justify the order of eviction, I shall confine myself to the grounds regarding subletting. Admittedly, the building is a business premises. The tenant has got his machinery there. He was running some journals previously and now he has stopped running them. There is one Ambika Litho Press there now which is being run by one Narayanan, who was previously the petitioner's manager Admittedly also the petitioner has no share in the business and the Ambica Litho Press is the lessee of the machinery belonging to the petitioner. Now the machinery cannot be run unless it is placed in the premises where it is situate So, the lessee of the machinery also gets the advantage of the use of the business premises also Therefore, the lease amount which the lessor receives should contain in it an element of rent for the building which is used to house the machinery as well as the rent for the use of the machinery. This is mere commonsense It is unbelievable that the lessor would take rent for the use of the machinery alone and not take any rent for the use of the business premises and agree to pay the rent himself. He should have stipulated for a lease amount which includes both the elements It is not an answer under these circumstances against the charge of subletting to say that the lessor does not take anything separately from the lessee by way of rent for the building itself or that he himself is paying the rent to the landlord and the sub-lessee is not paying the rent to the landlord I am not satisfied that the decision relied upon by the petitioner and reported in *Subbanna Sastry* v. *Abdulla*[1] can help the petitioner. On the other hand the decision in *Venkatarama Iyer* v. *Renters Ltd.*[2], is directly against the petitioner.

This Civil Revision Petition is dismissed as one without merits. Time for vacating three months.

V S. *Petition dismissed.*

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1. (1959) 2 M L.J. (N.R C.) 23. 2. (1951) 2 M.L J (N R C.) 57.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Vellinayagi .. *Petitioner**

v.

T. Subramaniam .. *Respondent.*

Hindu Marriage Act (XXV of 1955), *sections* 12 (1) (d) *and* 12 (2) (b) (ii)—*Petition for annulment of marriage under section* 12 (1) (d) *filed beyond the period prescribed by section* 12 (2) (b) (ii)—*Not maintainable—Delay cannot be condoned.*

What is laid down in section 12 (2) (*b*) (*ii*) of the Hindu Marriage Act is a condition subject to which alone a petition for annulling a marriage under section 12 (1) (*d*) could be filed It is not a period of limitation and section 5 of the Limitation Act cannot apply. Compliance with section 12 (2) (*b*) (ii) is therefore a condition precedent to the entertainment of a petition under section 12 (1) (*d*) and the Court has no jurisdiction to condone the delay in filing it.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Tanjore, dated 7th September, 1966 in I.A. No. 11 of 1966 in O.P. No. 6 of 1966.

V. N. Krishna Rao, for Petitioner.

S. Ramalingam, for Respondent.

The Court made the following

ORDER —This is a petition to revise the order of the learned Subordinate Judge of Thanjavur in I.A. No 11 of 1966 in O P. No. 6 of 1966 O. P. No. 6 of 1966 was filed by the present respondent for annulment of his marriage with the petitioner. Along with the original petition No 6 of of 1966, he filed the interlocutory application out of which this Civil Revision Petition arises for condonation of the delay of of one year, six months and twenty four days in presenting the petition. The parties were married on 28th June, 1963. The petitioner gave birth to a child on 26th February, 1964. The petitioner (respondent) intimated to the Municipal authorities on 8th March, 1964, disowning the said child. Thereafter he filed the petition for annulment of marriage on 6th January, 1966 On behalf of the petitioner (herein) objection was taken that the Court had no jurisdiction to condone the delay in the presentation of the petition for annulment of the marriage and that the conditions laid down in section 12 (2) of the Hindu Marriage Act were conditions subject to which alone an application for annulment of a marriage under clause (*d*) of sub-section (1) of section 12 could be maintained. The learned Judge thought that the question for decision in the case was whether the petition for excusing the delay was a *bona fide* one and whether the petitioner had not filed the petition under section 12 on a *bona fide* mistake of fact. He also thought that in a matrimonial case it would be very difficult to apply strictly the law of limitation because when the Hindu Marriage Act alone provided for dissolution of the marital tie on the ground of the wife being proved to have been conceived on the date of the marriage by a person other than the petitioner it would not be possible for the husband to obtain the relief under any other law and that by excusing the delay no injustice would be caused I am afraid question of *bona fide* mistake of fact does not arise in this case. We are not now concerned with the question whether the requirements of sub-clauses (*i*) and (*iii*) of clause (*b*) of sub-section (2) of section 12 are satisfied. We are only concerned with the question whether the requirements of section 12 (2) (*b*) (*ii*) have been satisfied. Sub-clause (*ii*) of clause (*b*) of sub-section (2) of section 12 is as follows .

" Notwithstanding anything contained in sub-section (1) no petition for annulling a marriage .—

(*a*) ....

* C.R P. No. 2665 of 1966. 18th June, 1968.

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the Court is satisfied (i) . . . (ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within the year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage."

What is laid down in sub-clause (ii) is a condition subject to which alone a petition for annulling a marriage could be entertained. It is not a period of limitation. Section 5 of the Limitation Act cannot apply to this case, because section 29 (3) of the Limitation Act of 1963 provides.—

" Save as otherwise provided in any law for the time being in force with respect to marriage and decree, nothing in this Act shall apply to any suit or other proceeding under any such law."

The wording of section 12 (2) of the Hindu Marriage Act is more or less similar to the wording of section 9 of the Provincial Insolvency Act, which is as follows :—

" (9) (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless... (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

A Full Bench of our Court in the decision reported in *Chenchurammana* v. *Arunachalam*[1], has laid down that the period of three months fixed in section 9 (1) (c) of the Provincial Insolvency Act is not a period of limitation but is a condition to an adjudication and accordingly an act of insolvency, which has occurred more than three months prior to the presentation of the petition, is not available as a ground of adjudication. I may also point out that a Bench of the Bombay High Court in *Sayalagram Kacherroo Bhatrao* v. *Yachadachai Salvaram Mistra*[2], has taken the view that:—

" Compliance with section 12 (2) (b) of the Hindu Marriage Act, 1956, is a condition precedent to the entertainment of a petition under section 12 (1) (d) of the Act, and therefore, a petition filed beyond the period mentioned in section 12 (2) (b) (ii) of the Act cannot be saved by reason of the provisions of section 10 of the General Clauses Act, 1897."

With respect I follow the decision of the Bench It follows therefore that the learned Subordinate Judge had no jurisdiction to allow I A. No. 11 of 1966 and condone the delay. The civil revision is allowed. I.A. No. 11 of 1966 will as a consequence stand dismissed. No order as to costs.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Annamalai Mudaliar .. *Petitioner**

v.

Perumal and others .. *Respondents.*

Motor Accidents Claims Tribunal—Award secured from, against owner of motor vehicle—Cannot be executed in a civil Court.

Under rule 18 of the Madras Motor Accidents Claims Tribunal Rules the several provisions of the First Schedule to the Civil Procedure Code, and mentioned therein, are made applicable to proceedings before the Claims Tribunal. It is significant to note that Order 21, Civil Procedure Code relating to execution of of decrees and order is conspicuously absent in rule 18. The argument therefore

1. (1935) I L R 58 Mad 794 . 69 M L J. 283 2 (1962) 64 Bom L R. 27.

* C R.P. Nos. 2512 and 2514 of 1966. 21st June, 1968.

that execution petitions are not maintainable in a civil Court as there is a specific exclusion as regards the applicability of Order 21, Civil Procedure Code, to proceedings before the Tribunal is not only well founded but also justified especially when the Legislature has expressly provided for the recovery of amounts covered by the award, from the insurer as envisaged in section 110-E of the Motor Vehicles Act Obviously there is a lacuna in the Act in that there is no specific provision to execute the award of the Claims Tribunal through the media of a civil Court as against persons other than the insurer.

(Need to introduce suitable amendments to remove the lacuna stressed)

Petitions under Article 227 of the Constitution praying the High Court to revise the order of the District Court of Salem in E P No. 5 of 1966 in M A C A. No. 37 of 1962, in E. P No 6 of 1966 in M A.C A. No. 56 of 1962, in E P. No. 7 of 1966 in M.A.C.A. No. 58 of 1962, respectively.

S. Jagadeesan, for Petitioner.

N. R. Raghavachari and the Additional Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—In this batch of Civil Revision Petitions, an interesting question has been raised, but the result, however, as is to be presently demonstrated, is very unfortunate. The petitioner in all these petitions is the same and is the owner of motor vehicles. The respondents are the legal representatives of three deceased persons who were involved in a fatal accident. The question that is argued in these petitions is whether the award secured by the respondents from the Accidents Claims Tribunal constituted under the Motor Vehicles Act, can be executed in a civil Court. The respondents filed execution petitions on the foot of the award secured by them from the Accidents Claims Tribunal, in the Court of the District Judge, Salem An objection was raised by the petitioner that the Execution Petition is not maintainable in the civil Court as there is no provision for such execution of an award under the Motor Vehicles Act. The learned Di trict Judge, however, thought that the Civil Procedure Code, is applicable to the execution of such awards through the media of civil Courts, and held that the execution petitions were maintainable. As against the said order, the owner of the vehicles, the petitioner herein has come up to this Court canvassing the legality of the said order

Mr. Venkataswami, learned Counsel for the petitioner, contends that the Motor Vehicles Act is a self-contained code by itself and in the absence of any provision therein enabling a claimant to file the award secured by him or her from the Accident Claims Tribunal in the ordinary civil Court of the land (for purpose of execution) no relief as such in execution can be obtained by the claimant. He relied upon certain provisions of the Act and the rules made thereunder and contends that the order of the learned District Judge is vitiated. The respondents, however, contending contra, would state that once execution of an order of a tribunal is entrusted in the hands of civil Courts which are the ordinary Courts of the land, then the normal principle that the common law of the land is automatically attracted should apply to the instant case and in this view the execution petitions are maintainable.

It is no doubt a normal norm of law that if once matters are entrusted to a civil Court for purposes of adjudication and disposal, then the law which governs such civil Courts would apply in the absence of any specific prohibition or interdict in that behalf Motor Accidents Claims Tribunal is constituted under section 110 of the Motor Vehicles Act, and it has the power to deal with applications for compensation arising out of an accident of the nature specified in section 110 Such accidents may involve death or bodily injury to persons Section 110-B enables the Claims Tribunal to pass what is characterised as an " award " For purposes of the present discussion, we are not concerned with sections 110-C and 110-B. Section 110-E however has to be necessarily quoted. It says:—

"Where any money is due from an insurer under an award, the claims tribunal may, on an application made to it by the person entitled to the money issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue."

Under this provision, any award of the Claims Tribunal, in so far as it concern an insurer, is executable, in the sense that the claimants may obtain a certificate for the purpose from the Claims Tribunal, on the basis of which the Collector of the district concerned is empowered to proceed to recover the same as if it is an arrear of land revenue. Under rule 18 of the Madras Motor Accidents Claims Tribunal Rules, the several provisions of the First Schedule to the Civil Procedure Code, and mentioned therein, are made applicable to proceedings before the Claims Tribunal It is significant, however, to note that order 21 relating to execution of decrees and orders is conspicuously absent in rule 18 of the above rules. It is in such a conspectus of the statutory provisions that the argument is advanced by the learned Counsel for the petitioner that execution petitions are not maintainable in a civil Court as there is a specific exclusion as regards the applicability of Order 21, Civil Procedure Code, to proceedings before the Claims Tribunal. The argument is not only well founded, but is also justified when the Legislature has expressly provided for the recovery of amounts covered by the award from the insurer as envisaged in section 110-E

Obviously there is a lacuna in the Act in that there is no specific provision to execute the award of the Claims Tribunal through the media of a civil Court as against persons other than the insurer. That such a lacuna does exist has been pointed out by a Division Bench of this Court in *K Gopalakrishna* v *Sankaranarayanan and others,*[1] *M. K. Subramania* v. *K. Gopalakrishna and others*[2]. It is apposite to extract an excerpt therein which is very pertinent.

"But if really no machinery is provided for in Chapter VIII of the Act, the remedy of the claimant is only to file a suit on the award, which creates a debt against the driver of the vehicle and such a suit would not be barred by reason of section 110-F of the Act. It is for the Legislature to make provision in Chapter VIII of the Act, for enforcing claims against other parties such as the driver. Evidently no such provision has been made as a party would generally be satisfied by getting his claims enforced by proceeding summarily against the insurer on the strength of the Collector's certificate obtained in pursuance of the award."

In the instant case, however, it is very unfortunate that the insurer has been exonerated and hence the complication

That there is a lacuna in the Act in so far as the realisation of the fruits of the award of the Claims Tribunal by a claimant as against a person other than the insurer is very conspicuous. The instant case should obviously be an eye opener to the competent authority to suitably modify or amend the Act so as to make it feasible for persons like the respondents who have lost their parents or near and dear relations in the fatal accident to realise the fruits of their labour through the ordinary process of law. If such persons are driven to the necessity of filing suits and facing litigation, then the very purpose of the award of the Claims Tribunal would be lost. In this case, I directed the Additional Government Pleader to address a letter to the concerned authorities to take up the matter forthwith and see that necessary amendments are made to the statute or the rules so that the consequential reliefs may be efficaciously enjoyed by persons who deservedly are entitled to its fruits. It appears that a letter has been sent by the learned Additional Government Pleader, but it is not known what action has been taken. It is imperative that this gulf should be bridged as early as possible.

With greatest restraint and being compelled to do so, I am disagreeing with with the order of the learned District Judge. It is also desirable that when the Legislature undertakes to amend the present law it should take care to see that the

1. C.M.A. No. 358 of 1964. 2. C.M.A. No. 399 of 1964.

unfortunate victims or their legal representatives, as the case may be, are not to be deprived of their legitimate rights of compensation by technical rules such as limitation, etc. With these observations, the Civil Revision Petitions are allowed. There will be no order as to costs.

V.K. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

K. Ramdass .. *Appellant**

v.

P. Samu Pillai .. *Respondent.*

Tort—Defamation—Complaint made to police officer—If absolutely privileged.

A complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely privileged and no action for defamation in respect thereof is maintainable

Case-law discussed.

Appeal against the decree of the District Court, Thanjavur in A S. No 48 of 1963, preferred against the decree of the District Munsif of Nagpattinam in O.S. No. 95 of 1962.

T S. Kuppuswamy Iyyer, for Appellant.

P. R. Gopalakrishnan and *B Soundarapandian*, for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for damages for defamation. The defamation consists of a complaint by the appellant to the police in which he had stated in connection with a theft, that the respondent alone was his enemy in all respects and that the theft might have been committed only by him to give trouble to him The trial Court took the view that the appellant *bona fide* and reasonably thought that the respondent (plaintiff) might have been responsible for the theft and could not, therefore, be said to have defamed the respondent. The lower appellate Court took the view that the complaint does not admit of any other interpretation than that respondent must have committed that theft and, therefore, allowed the appeal and decreed the suit.

In this Court, the only point taken before me is that the complaint given by the respondent is absolutely privileged and that therefore, the lower appellate Court was wrong in having allowed the appeal and decreed the respondent's claim. Clearly this contention has got to be upheld in view of the decisions of this Court in *Bapalal & Co* v. *Krishnaswami Iyer*[1], King, J , after an exhaustive review of all the decisions on the question, held that a complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath, is absolutely privileged. Abdur Rahman, J., in a case reported in the same volume at page 538 *Vettappa Kone* v. *Muthukaruppa*[2], also took the same view. Both the learned Judges referred to an earlier Bench decision of this Court in *Sanjeevi Reddi* v *Koneri Reddi*[3], in which Coutts Trotter, C J. and Viswanatha Sastri, J., took the view that statement made in a complaint to a Magistrate under section 107 Criminal Procedure Code, and a repetition of the same statement before a police officer to whom the Magistrate referred the complaint for enquiry and report are absolutely privileged and no action for defamation in respect of such statement is maintainable In that case though the original complaint was before a Magistrate and therefore absolutely privileged, it could plausibly

* S A No 838 of 1964 9th July, 1968

1. I L R (1941) Mad 332 : (1940) 2 M L J 556 A I R 1941 Mad. 26
2. (1941) 1 M L J 200 : A.I.R. 1941 Mad. 538 460.
3. (1926) I.L.R 49 Mad. 315 · 50 M L J.

be argued, that a statement made before a police officer when a complaint made to a Magistrate is referred by him to the police for investigation, should be held to be equally privileged like the statement or the complaint before the Magistrate. All the same the view of the Law taken by the Bench is categoric At page 319 Coutts Trotter, C J., puts the principle thus—

> " I am, therefore, of opinion that the statements made to the police officer which could only be made with a view to their being repeated on oath before the Magistrate were absolutely privileged."

The learned Judge referred to the statement of law in *Watson* v. *M'Ewan*[1], in which Lord Halsbury stated—

> " It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove."

After referring to the statement of law by Lord Halsbury, Coutts Trotter, C J. proceeded—

> " I take that as clearly implying that all statements made by a potential witness as a preliminary to going into witness box are equally privileged with the statements made when actually in the box in Court."

Viswanatha Sastri, J , referred to the Bench decision in In re *Muthuswamy Naidu*[2], where it was held that a defematory statement in a complaint to a Magistrate was absolutely privileged and while discussing the question whether any such privilege could be claimed in respect of statements made to the police the learned Judge referred to the decision of Seshagiri Aiyar, J , In re *Kakimara Anjaneyalu*[3], to the effect that the rule of law that parties before the Court are absolutely privileged cannot be extended to the case of complaints to a police constable Then he went on to refer to the case in *Watson* v *M'Ewan*[1], already referred to and held that where a Magistrate referred a matter to the police for investigation, statements made to the police were also absolutely privileged. The case in *Sanjivi Reddi* v *Koneri Reddi*[4], as I mentioned, was a case of a complaint made to a Magistrate which was referred to the police for investigation and therefore it could be said that as the statement made to the police was only following a complaint made to a Magistrate that was privileged But the statement of law as laid down by Coutts Trotter, C J. is categoric and this was accepted by King, J., and Abdur Rahman, J. The Calcutta High Court *Madhabchandra Gose* v. *Nirode Chandra Gose*[5], took the same view. In fact Ghose, J , referring to the decision in *Watson* v. *M'Ewan*[1], stated that in a sense statements made to the police appear to be on stronger ground than statements made to a solicitor, as reported in the case of *Watson* v. *M'Ewan*[1] That also was a case where the complaint was made to the police in the first instance The decision of this Court relied upon by the respondent in *T. Ayyangar* v. *K. S. Ayyangar*[6], cannot help him In that case the petition which was sought to be made the basis of a claim for defamation was held, on the facts, not to be a petition where an action was sought to be taken under section 107, Criminal Procedure Code and that in the absence of the basis for any belief by the defendant that he was making these statements with a view to repeat them on oath at subsequent judicial proceedings to be taken by the Deputy Inspector-General of Police the defendant was not free from liability for damages.

In *Majju* v *Lakshman Prasad*[7], a distinction was drawn between a complaint to the police which in fact led to judicial proceedings and one which did not and the complaint in the latter case was held not to privileged As would be observed

1. L R (1905) A C 480
2. (1914) I L R 37 Mad 110.
3. (1916) 35 I C 813
4. (1926) I L R 49 Mad 315 50 M L J 460.
5. I L R (1939) 1 Cal 574
6. (1957) 2 M L J 71 A I R 1957 Mad 756.
7. (1924) I.L R 46 All 671.

from the Calcutta decision and the decisions of this Court such a ground of distinction is not made either by this Court or by the Calcutta High Court. Reliance was placed on behalf of the respondent on the decision of the Bombay High Court in *Marogi Sathasiv* v *Godubai Narayanarao*[1] The learned Judge who decided that case refers to the Calcutta High Court decision and this Court's decision and prefers to follow the earlier decision of the Bombay High Court in *Ganagapagounda* v *Basayya*[2] But it is not open to me to do so and I am bound to follow the decision of this Court and following the decision, I hold that the complaint by the appellant to the police was absolutely privileged The appeal therefore has got to be allowed It is accordingly allowed and the suit will stand dismissed. But in view of the uncertain position of law, both parties will be directed to bear their own costs throughout.

V.K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE A ALAGIRISWAMI.

Kariyan Chettiar and another .. *Appellants**

v.

T. Rangia Goundar and another .. *Respondents.*

Limitation Act (IX of 1908), Article 134-B—Kattalai trustee—Alienation of properties—Trustee still alive and not replaced—No removal or resignation—General trustee of the temple. appointed by the Board—Suit by general trustee to recover kattalai properties—If barred by limitation—Principles—Suit by a worshipper to recover temple properties—Competent—Trust.

The plaintiff, as a general trustee, appointed by the Religious Endowment Board, sued to recover the kattalai properties alienated by kattalai trustee, who was alive on the date of the suit, and who had not been replaced by another trustee. On the applicability of Article 134-B of the Limitation Act.

Held, the suit is not barred by limitation under Article 134-B of the Limitation Act.

The plaintiff as a trustee appointed by the Board is entitled to maintain the suit It is also well established that any worshipper of a temple can institute a suit to recover the temple property which has been wrongfully alienated by a trustee.

Where the temple trustee and the kattalai trustee are different persons and the latter had alienated the properties endowed for the kattalai, it is open to the general trustee of the temple, if the actual trustee who has alienated the properties is still alive, to institute a suit to recover the kattalai properties.

The trustee who has alienated is still alive, he has not left the village, he has not resigned nor has be been replaced by some other trustee either appointed by the Board or *de facto* trustee, who has taken over the performance of the trustee's duties. It cannot therefore be held that the alienor trustee has been removed from the trusteeship or that he has resigned Article 134-B could have no application as none of the contingencies contemplated by that Article have taken place

Srinivasa v. *Ramaswamy* (1967) 1 S C J. 645 : (1967) 1 An W R (S.C) 141 : (1967) 1 M L J (S C) 141 : (1966) 3 S.C R. 120: A.I.R. 1966 S C. 859, referred.

Appeal against the Decree of the District Court, Coimbatore, in Appeal Suit No. 19 of 1963 preferred against the Decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 119 of 1960.

R. Desikan, for Appellant

R Ramalingam and *S. Sehuratnam* and *A S. Venkatachalamurthi*, for Respondents.

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1 A I R 1959 Bom 443 2 A I R 1943 Bom. 167

* S.A No 684 of 1964. 6th August, 1968.

The Court delivered the following

JUDGMENT.—The defendants are the appellants In 1904 one Venkata Chetty and one Rangammal executed a deed of trust Exhibit A-1 in favour of Maniam Kaliappa Goundar. In 1924, Kaliappa Goundar's nephew, the present third defendant, sold these properties under Exhibit A-2 in favour of one Billiammal. Billiammal has conveyed her rights in favour of the first defendant and the first defendant has created a maintenance right in favour of the second defendant over the suit properties The plaintiff who is the trustee of Sri Kulandaivelayuthaswami Devasthanam, Kurundamalai, filed the suit out of which this second appeal arises, for possession of the suit properties on the ground that the properties had been endowed in favour of the Devasthanam The contentions of the defendants were firstly that the effect of the document executed by Venkata Chetty and Rangammal in favour of Kaliappa Gounder was that he became the owner of the properties and the properties were merely charged with expenses of certain charities to be performed under the deed, secondly that the sale by 3rd defendant was for legal necessity, thirdly that plaintiff is not entitled to maintain the suit and lastly that the suit is bared by limitation

There is no substance in any one of the first three contentions. As regards the first, it is clear that Exhibit A-1 was not gift deed in favour of Kaliappa Gounder. A reading of the document would make it clear that he was merely constituted a trustee for performing poojas and *rathotsavams* of the Devasthanam, which were used to be done earlier by the persons who created the deed No beneficial interest has been given to Kaliappa Goundar himself There can, therefore, be no question of Kaliappa Gounder becoming the owner of the properties and the properties being merely charged with expenses of the charities Kaliappa Goundar was merely a trustee.

As regards the second point clearly the sale is not for legal necessity Exhibit A-2 shows that the present third defendant, who executed it, found it difficult to look after the suit properties and also to lease the same or realise the lease amount, and therefore, he was alienating the same It is also stated that as there was no proper way to go to the lands by cart or otherwise, the properties were being sold in order that the third defendant might purchase other properties instead Admittedly, the third defendant has not purchased any other property. The reason mentioned above cannot be put forward at all, as sufficient justification for the sale or its constituting legal necessity justifying the sale After all the persons, who have purchased the properties were enjoying the same and apparently they are able to reach those lands So the contention of the legal necessity for the sale has got to fail.

As regards the third point the plaintiff is appointed by the Hindu Religious and Charitable Endowment Board as a trustee for the temple Even apart from these considerations, it is well established that any worshipper of a temple can institute a suit to recover the temple property which has been wrongfully alienated by a trustee. The third defendant has executed Exhibit A-2 merely as a trustee and therefore, the plaintiff can maintain this suit

Lastly comes the question of limitation On this point the contention on behalf of the defendants is that the third defendant having sold the properties in 1924 and not having had anything to do with the temple or with the trust after that date, the suit is barred by limitation under Article 134-B of Schedule I of the Limitation Act The contention on behalf of the plaintiff is that as the third defendant is still alive and has not been removed, nor has he resigned, the suit is in time Defendants 1 and 2, who are persons interested in the property, have in paragraph 17 of the written statement stated as follows on this point:

> "The plaintiff has not chosen to state from when Muthuswamy Gounder has not been functioning as a trustee These defendants do not admit that Muthuswamy Gounder has not been removed or resigned so as to give a cause of action for the plaintiff to file this suit."

The contention is put in a very involved way. They do not say whether Muthuswamy Gounder has or has not been removed or has or has not resigned The third defendant himself also does not say whether he is still a trustee. All that he says in paragraph 5 of his written statement is as follows :—

> " The defendant has administered the trust properly when he was actually in charge of trust and the allegations to the contrary are all false. As already stated this defendant and his father have spent more than Rs 6,000 from their funds for the purpose of protecting the interests of the temple This defendant no doubt was liable to render accounts in respect of the amounts received and when the proper person approaches him for the rendering of the amounts, this defendant will be prepared to do so. In fact, he is anxious for a settlement of accounts since actually a sum of Rs. 1,000 will be due to this defendant from the trust."

Thus, he has not repudiated the trust He has not stated that he is no longer the trustee He admits his liability to render accounts and even his statement that he has administered the trust properly when he was actually in charge of the trust, is not quite clear as to whether subsequently he has been administering the trust or not However, strictly speaking, the third defendant cannot be said to have either resigned or removed from the trusteeship or to have ceased to be the trustee.

Reliance was placed upon the decision in *Bhuban Mohan Koley* v *Narendra Nath Konwar*[1], where it was laid down that a shebait has no vested interest in the debutter property; he is a mere manager of the idol to whom the property belongs and being a manager, he ceases to be a shebait when he ceases to manage the property and carry on the worship of the idol Now in this case neither the third defendant nor Kaliappa Gounder were in charge of the temple duties They were merely in the position of *Kattalai* trustees and, therefore, this decision cannot be applied to the facts of this case The decision in *Ramlagan Gossain* v *Nandipat Mohton*[2] is not at all in point On the other hand in *Sanyasamma* v *Viriswaraswami*[3], it has been laid down that it is not the cessation of trusteeship generally that matters for purposes of the application of Article 134-B, that the cessation must be by means of the three events referred to in the third column of the article, death, resignation or removal, that the prior trustee may have alienated wrongfully all properties belonging to the trust, but that does not mean that he has ceased to be trustee and that the period of limitation will start only from the date of the order of appointment of the new trustees and formal removal of the prior trustee Now all these cases may not be very much in point after the decision of the Supreme Court in *Srinivasa* v. *Ramaswamy*[4], on which the appellants rely. The fact in that case were as follows

One Pachai Kandai Udayavar was the trustee of a temple. Almost all the properties belonging to the temple had in course of time been alienated and the alienors were no longer interested either in the temple or staying in the village itself Worship in the temple for 27 years had been performed by other people and the alienor and his son had left the village more than 25 years earlier. But they were alive on the date of suit. The Hindu Religious and Charitable Endowment Board appointed the plaintiffs in that suit as trustees in June, 1948 and in that order it was stated that there was no legally constituted trustee of the temple On these facts, the trial Judge held that the alienor must be deemed to have resigned his office and left it. The first appellate Court held that the transferor and his family had been claiming beneficial interest in the properties all along and that they were not holding the same as managers of the trust and that, therefore, confirmed the finding of the trial Judge On the question of possession though on a somewhat different ground the High Court relied on the fact that the alienor was still alive and so held that the plea of adverse possession could not be sustained. The Supreme Court in discussing this question observed as follows :

1. (1931) 35 Cal W N 478.
2. A I R 1938 Pat 143
3. (1951) 2 M L J 391 · A.I.R 1952 Mad 171.
4. (1967) 1 S C J. 645 (1967) 1 An W R (S C) 141 (1967) 1 M L J (S C) 141 (1966) 3 S C R 120 : A I R 1966 S C 859

" Unfortunately, the question as to whether the facts proved in this case did not show that the alienor had been removed from office by other persons who were in management of the temple *de facto* has not been discussed by the High Court. In our opinion, all the facts which nave been brought on the record in relation to this aspect of the matter, clearly show not only that the alienor disposed of all the property and left the village, but also that for the last 25 years or so, the management has been taken over by other persons who are acting as *de facto* managers of the temple. This evidence appears to us to show that the alienors had been removed from management of the temple, and other persons have taken up the postition as *de facto* managers, and this position has lasted for more than 25 years If that be so, there is no escape from the conclusion that more than 12 years have elapsed since the date of the removal of the previous manager who transferred the properties in question, and so, if a suit were brought by respondents 1 to 3 on the date when they were appointed trustees by respondent No. 4 it would be barred under article 134-B."

It would be noticed that the principle of that decision would not apply to the facts of this case Here, we are not concerned with the manager of the temple alienating the temple properties, neither Kaliappa Gounder, nor the third defendant, were the managers of the temple, nor had there been any change in their position as in the case before the Supreme Court. When the suit was filed, defendant 3 was alive It is not a case where like the alienors in the Supreme Court case they had left the village altogether. In a case like the present one where the temple trustee and the Kattalai trustee are different persons and the latter had alienated the properties endowed for the Kattalai, it is open to the general trustee of the temple, if the actual trustee who has alienated the properties is still alive to institute a suit to recover the Kattalai properties The trustee who has alienated is still alive, he has not left the village, he has not resigned, nor has he been replaced by some other trustee either appointed by the Hindu Religious and Charitable Endowment Board or *de facto* trustee, who has taken over the performances of the trustee's duties It cannot, therefore, be held that the third defendant in thus case has been removed from his trusteeship, nor has he resigned Article 134-B could have no application, as none of the contingencies contemplated by that Article have taken place in this case.

The suit is, therefore, in time and the Second Appeal is dismissed as one without substance Parties will, however, bear their own casts as what has happened is not due to the mistake wholly on the part of the defendants.

No leave.

V. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Messrs. Icco Engineers .. *Petitioner**

v.

Appellate Assistant Commissioner (Commercial Taxes-III), Madras-10. .. *Respondents.*

Madras General Sales Tax Act (I of 1959), section 31 (1), Provisos 1 and 2—Scope.

The second proviso to section 31 (1) could not be mixed up with or both the provisos could not be read into one another. They provide for two separate matters If and when the admitted tax is fully paid the appeal becomes entertainable Nevertheless, the question of limitation may arise In that event, the relevant proviso would be the first one which enables the officer in case there is sufficient cause to excuse the delay.

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* W.P. No. 2076 of 1968. 12th August, 1968.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, the High Court will be pleased to issue a writ of *certiorari* calling for the records in R. C. No. 1464 of 1967 on the file of the respondents herein and quash the order dated 4th April, 1967 made therein.

S. C. Shah, for Petitioner.

The Assistant Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—There was a delay of eight days in filing the appeal before the Appellate Assistant Commissioner (Commercial Taxes), Madras-10, and also while presenting the appeal the second proviso to section 31 (1) was not complied with. Later on the admitted tax was paid. But it appears on a wrong view of the matter the Appellate Assistant Commissioner found that the appeal was out of time and dismissed it, stating that there was no sufficient cause for the delay.

We do not think that the second proviso could be mixed up with or both the provisos could be read into one another. They provide for two separate matters. If and when the admitted tax is fully paid the appeal becomes entertainable. Nevertheless, the question of limitation may arise. In that event, the relevant proviso will be the first one which enables the officer in case there is sufficient cause for the delay to excuse the delay. In the circumstances of this case we are satisfied that there was sufficient cause.

The writ petition is allowed. There will be a direction to the Appellate Assistant Commissioner aforesaid to entertain (the appeal) and dispose it of in accordance with law. No costs.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

Mrs. Kamalam Paul .. *Appellant**

v.

G. H. Rama Rao .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 66 (2) (e)—Terms of Proclamation—Fixation of upset price—Elaborate reasons need not be given.

There is no doubt that no auction can be held without an upset price being fixed. Otherwise only the judgment-debtor will suffer. In fixing the upset price, the Court has necessarily got to take into consideration various factors and it is not necessary that the Court should give elaborate reasons for fixing the upset price. After all upset price only represents the price below which the Court is not prepared to accept offers for the property. Even though the upset price may be fixed at a certain figure there is no objection to any purchaser buying the property for the value given by the judgment-debtor or even more.

Petitions under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the (Principal) Subordinate Judge, Coimbatore dated 30th January, 1968 and made in E.P. No. 257 of 1967 in O.S. No. 219 of 1966.

R. A. Kalan, for Appellant.

K. S. Champakesa Iyengar and *K. C. Srinivasan*, for Respondents.

The Court delivered the following

JUDGMENT:—This is a petition to revise the order of the learned Subordinate Judge of Coimbatore in E.P. No. 257 of 1967 in O.S. No. 219 of 1956. In settling the terms of the proclamation of sale of the hypotheca, the lower Court made the following

* C.R.P. No. 493 of 1968. 16th August, 1968.

order.—

"Amin's value Rs. 20,000; Decree-holder's value Rs. 17,000; Judgment-debtor's value Rs 50,000. Encumbrance nil Upset price Rs 20,000"

The grievance of the petitioner is that the fixation of the upset price at Rs 20,000 by the lower Court is purely arbitrary and not guided by any exercise of judicial discretion and that the Court should have fixed the upset price at Rs 50,000

I see no question of jurisdiction nor any mistake of law which vitiates the order of the lower Court Order 21, rule 66 (2) (*e*) of the Code of Civil Procedure says that the terms of the proclamation shall specify the value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor. That has been done in this case and thus the rule in question has been complied with The only thing about which something may have to be said is the fixing of the upset price. There is no doubt that no auction can be held without an upset price being fixed. Otherwise, it will only become a Dutch auction In *Thiruvengadaswamy Iyengar* v. *Govindaswamy Udayar*[1], which is usually relied on as an authority for the proposition that it is enough if the valuation of the property as mentioned by the decree-holder and the judgment-debtor is mentioned in the sale proclamation and that the Court is under no obligation to fix its own value, it is stated at page 662 as follows :—

"Having regard to the fact that in this case the Commissioner's calculation has also been set out in the proclamation, the criticism based on the ground of possible confusion is not open On the reason of the thing also, we are unable to see why it should be necessary for the Court to fix the valuation *more especially when the reserve price is also generally, fixed by the Court*, and the price fetched at a sale often depends not on what may be called the intrinsic value of the property but on the demand for the property at the time of the sale"

Thus the necessity for the reserve price which is called the upset price has been recognised by the Bench which decided that case Without an upset price being fixed it is not possible to hold an auction at all Otherwise only the judgment-debtor will suffer. In fixing the upset price, the Court has necessarily got to take into consideration various factors and it is not necessary that the Court should give elaborate reasons for fixing the upset price. After all, upset price only represents the price below which the Court is not prepared to accept offers for the property. Even though the upset price may be fixed at Rs 20,000 there is no objection to any purchaser buying the property for Rs. 50,000 which is the value given by the judgment-debtor or for even more.

There are no merits in the Civil Revision Petition and it is dismissed.

V K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE M M ISMAIL

M. S. Dakshinamurthi Mudaliar .. *Petitioner**

Guardians and Wards Act (VIII of 1890), *sections* 7 *to* 10 *and* 29—*Application under, by father for appointing or declaring him as guardian of Hindu minor—Maintainability*

Under the Hindu law, a father is the natural guardian of his minor son and he does not require any order from any Court appointing him or declaring him as the guardian of his minor son Consequently an application by the father for the purpose of appointing him or declaring him as the guardian of the minor in respect of properties belonging to the minor would not be maintainable under the provisions of the Guardians and Wards Act, 1890. This position gets further strengthened after the enactment of the Hindu Minority and Guardianship Act, 1956

Petition under section 10 of the Guardians and Wards Act for appointing the petitioner as Guardian of his minor son etc.

T A. Ramaswamy Reddy, for Petitioner.

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1 (1928) I L R 51 Mad 655 : 55 M L J 363

* O.P No. 164 of 1968 17th September, 1968.

The Court made the following

ORDER.—This is a petition under sections 7 to 10 and 29 of the Guardians and Wards Act read with clause 17 of the Letters Patent, for appointing the petitioner herein as the guardian of his minor son and enabling the petitioner to mortgage a particular item of property belonging to the minor, for fixing the maintenance of the minor and also the remuneration of the petitioner. It is stated that the properties which belong to the minor have been settled on the minor by his paternal grandfather under deeds of settlement, dated 19th July, 1955 and 7th March, 1962.

The first question for consideration is whether this petition for appointment of the petitioner as the guardian of his minor son is maintainable at all. There are two decisions of this Court, both of them by Benches, holding that under the Hindu Law, a father is the guardian of his minor son and he does not require any order from any Court appointing him or declaring him as the guardian of his minor son and consequently an application for such a purpose under the Guardians and Wards Act is not maintainable. The said decisions are *Sivasankara Mudaliar* v. *Radhabai Ammal*[1], and *Abubacker* v. *Mariyamma*[2]. The learned Counsel for the petitioner contends that these decisions deal with the appointment of the father as the guardian of the person of his minor son. But these decisions do not make any distinction between the appointment of a guardian of the person of the minor or the property of the minor, since under the personal law applicable to the minor, the father is the natural guardian of both the person and the property of the minor. On the other hand, Mr. T. A. Ramaswami Reddy, learned Counsel for the petitioner, brought to my notice a decision of this Court in *Thiruvengada Mudaliars In re*[3] (In the matter of A. T. Vasudevan and others, minors). That case was concerned with the appointment of the father as the guardian of his minor sons in respect of the joint family property belonging to the father as well as the minor sons. In my opinion, the guardianship with reference to the undivided interest of a minor in a joint family property stands on a different footing from the guardianship in respect of the property belonging to the minor exclusively and that distinction has been given statutory recognition in section 6 of the Hindu Minority and Guardianship Act, 1956 itself. That section provides that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are in the case of a boy or an unmarried girl—the father, and after him, the mother. Therefore, even before the enactment of the Hindu Minority and Guardianship Act, the Courts have recognised the distinction between the appointment of the father as the guardian of his minor son in respect of the minor's property and the appointment of the father as the guardian of his minor son in respect of his undivided interest in the joint family property. Hence the decision in *Thiruvengada Mudaliar*[3], which only dealt with the appointment of the father as a guardian in respect of the undivided interest which the minors had in the joint family property cannot be of any assistance to support the case of the petitioner in this case. Then Mr. T. A. Ramaswami Reddy relied on the decision in *Seera Reddi* v. *Chenna Reddi*[4]. In that case an application under section 10 of the Guardians and Wards Act was made by a father for declaring him as the guardian of his minor son and that application was dismissed by the learned District Judge. But on appeal a Bench of this Court reversed that conclusion. It may be of interest to note that the judgment itself points out the two grounds on which the learned District Judge dismissed the application. The first reason was that since the death of the minor's mother immediately after the birth of the minor, the father had married a second wife and was at the relevant time living in the house of the second wife's father and the second reason which impelled the learned District Judge to reject the application was that the petition to the lower Court was made 19 months after and therefore there was undue delay

1. (1939) 2 M.L.J. 515.
2. (1945) 2 M.L.J. 463.
3. (1948) 2 M.L.J. 47.
4. (1950) 2 M.L.J. 33.

in the making of it. The learned Judges of this Court did not agree with these two reasonings of the learned District Judge and allowed the appeal. It was not argued before the learned Judges and the learned Judges did not have occasion to consider the question whether the father, being the natural guardian under the personal law, could have been appointed or declared as the guardian of his minor son under the provisions of the Guardians and Wards Act. Therefore, in my view, this decision also does not support the case of the petitioner. The learned Counsel for the petitioner also relied on the decision in *Sakthi* v. *Kuppathammal*[1], That case dealt with an application made under sections 29 and 31 of the Guardians and Wards Act by a guardian appointed under the provisions of that Act before the enactment of the Hindu Minority and Guardianship Act, 1956. Basing himself on this decision, Mr. Ramaswami Reddy argued that even after the enactment of the Hindu Minority and Guardianship Act, an order has been passed under the provisions of sections 29 and 31 of the Guardians and Wards Act. But Mr. Ramaswami Reddi has overlooked one crucial and significant fact, namely, in that decision, in O.P. No. 67 of 1953, that is, in a petition filed under the provisions of the Guardians and Wards Act, 1890. Before the enactment of the Hindu Minority and Guardianship Act, 1956, the guardian was appointed and that guardian applied for direction or permission under sections 29 and 31 of the Guardians and Wards Act, 1890. Further there is nothing in that decision to show that in the original petition itself, it was the father of the minor, who was the natural guardian under the personal law applicable to the minor, was appointed as the guardian of the property of the minor under the provisions of the Guardians and Wards Act. Therefore, that decision also does not advance the case of the petitioner any further with regard to his present petition for appointment as the guardian under the Guardians and Wards Act, 1890.

Consequently, the position even before the enactment of the Hindu Minority and Guardianship Act, 1956 was that the father of a Hindu minor, being the natural guardian under the personal law applicable to the minor, did not require the support of any order of any Court under the provisions of the Guardians and Wards Act, 1890 and therefore, an application by him for the purpose of appointing him or declaring him as the guardian was not maintainable under the provisions of that Act. That position gets further strengthened after the enactment of the Hindu Minority and Guardianship Act, 1956. No doubt the later statute itself declares that the provisions contained therein are not in derogation of the provisions contained in the Guardians and Wards Act 1890. At the same time, the statutory declaration contained in section 6 of the Act declaring the father as the natural guardian of both the person and the property of his minor son will inevitably lead to the conclusion that an application by the father for appointing him or declaring him as the guardian of his minor son under the provisions of the Guardians and Wards Act will not lie.

Mr. Ramaswami Reddy argued that for certain other basic reasons, it must be held that such a petition is maintainable. The reasons, advanced by the learned Counsel is that the natural guardian may not be in a position to deal with the property of the minor even for the benefit of the minor, and therefore he must be armed with a declaration or order of appointment by the Court to enable him to deal with the property of the minor with the permission of the Court. Whether any justification or plausibility could have been claimed in support of such an argument before the enactment of the Hindu Minority and Guardianship Act, 1956 or not, at any rate, after the enactment of that statute, no significance whatever can be attached to such an argument. Sub-section (1) of section 8 of that Act provides that the natural guardian of a Hindu minor has power, subject to the provisions of that section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate, but the guardian can in no case bind the minor by a personal covenant. Sub-section (2) provides that the natural guardian shall not, without the previous permission of the Court (*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise,

1. (1960) 2 M.L.J. 89: I.L.R. (1960) Mad. 1164.

any part of the immovable property of the minor, or (*b*) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority; and these provisions correspond to sections 27 and 29 of the Guardians and Wards Act Sub-sections (3) and (4) of section 8 of the Hindu Minority and Guardianship Act, 1956 correspond to sections 30 and 31 of the Guardians and Wards Act, 1890. Thus there are sufficient and adequate statutory provisions in the Hindu Minority and Guardianship Act enabling a natural guardian to approach the Court for necessary permission or direction, corresponding to the provisions contained in the Guardians and Wards Act, 1890, which a guardian appointed or declared under that Act, can have recourse to. Therefore, simply on this ground it cannot be contended that the natural guardian must be held entitled to apply for his appointment as the guardian under the provisions of the Guardians and Wards Act, 1890.

Under these circumstances, I hold that this petition under sections 7 to 10 and 29 of the Guardians and Wards Act and clause 17 of the Letters Patent for appointment of the petitioner as the guardian of his minor son in respect of the properties settled on the minor by his paternal grandfather is not maintainable and is liable to be dismissed and accordingly is dismissed.

V K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE K. S VENKATARAMAN AND MR. JUSTICE K S. RAMAMURTI

Minor Dorairaj also called Karuppiah Pillai *alias* Aiyaswami by his next friend and maternal uncle V. Chintamani *Appellant* *

v.

K. KR Karuppiah Ambalam *alias* Karuppiah Pillai *alias* Periayya, and others *Respondents.*

Partnership Act (IX of 1932), *section* 42—*Partnership consisting of two partners—Death of one of them—Effect of*

Civil Procedure Code (V of 1908), *section* 20 *and Order* 8, *rules* 3 *to* 5—*Institution of suit—Jurisdiction—Suit for accounts of dissolved partnership—Assets of partnership in the shape of immovable properties in foreign country—No dispute about title—Institution of suit where defendant resides—Maintainability—Absence of specific denial in written statement—Effect of.*

Registration Act (XVI of 1908), *sections* 1 (2) *and* 17 (1) (b)—*Object and applicability of—Compromise deed—Immovable properties situate in foreign country—Whether requires registration—Admissibility of*

As pointed out in *Commissioner of Income-tax* v *Seth Govindram Sugar Mills*, (1965) 2 I T J 170 : (1965) 2 S.C J 289 A I R. 1966 S C 24, a firm of two partners necessarily gets dissolved on the death of one of the partners and to such a partnership the phrase " subject to contract between the partners " cannot apply, because a partnership necessarily involves a minimum of two partners Even where the legal representatives of the deceased partner take his place and carry on the business with the other partner, it will only be a new partnership.

The important principle to bear in mind is that the suit here is essentially an action *in personam* against a defendant who is amenable to the jurisdiction of the Subordinate Judge's Court, Devakottai It is an accepted principle that in such cases the Court (where he resides) will have jurisdiction to try the action The partnership has assets in the shape of immovable properties in Malaya, and there is no dispute about the title of the partnership to those assets, so far as the plaintiff and the first defendant are concerned Once it is ascertained whether any amount is due from the first defendant and if so the quantum thereof, it may well happen that the parties may agree about the valuation of the assets in Malaya

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*Appeal No. 349 of 1962. 26th September, 1968.

and the defendant may pay the proportionate share thereof to the plaintiff in India itself which the plaintiff may accept. In such a case the plaintiff need not go to the foreign Court in Malaya at all. Secondly, even if it is necessary to sell the immovable property in Malaya it may be done by a receiver appointed by the Subordinate Judge's Court, Devakottai, and, under the rules of Private International Law and Comity of Nations, the foreign Court in Malaya is bound to recognise the appointment of the receiver. Thirdly, even if it should become necessary for the receiver to remove any impediment or obstruction from any third party in Malaya the receiver can seek the aid of the foreign Court and the action will be tried according to the laws prevailing in Malaya (held, the Subordinate Judge's Court had jurisdiction to entertain the suit and, if it becomes necessary, the Court would have jurisdiction to appoint a receiver to realise the assets of the partnership (including immovable properties) situate in Malaya.

After construing the terms of Exhibit A-5, it was held that it merely recites the pre-existing rights of the parties in the immovable properties of the partnership in Malaya, (2) it does not deal with any specific immovable property and allot it to one or the other of the parties; and (3) the Indian Registration Act of 1908, and in particular section 17 (1) (*b*), would apply only to India and cannot apply to immovable properties situate in Malaya. The object of the legislation is only to provide for compulsory registration in respect of immovable property in India so that the title may be clear, and it is no concern of the Indian Legislature to legislate with respect of the title of immovable properties in Malaya, Indian Registration Act could not prescribe for the registration of a document like Exhibit A-5 in so far as it deals with immovable properties situate in Malaya. Held, Exhibit A-5 was admissible.

The written statement does not specifically traverse the allegation that the defendant was absent from India and hence under Order 8, rules 3 to 5, the first defendant must be deemed to have admitted the periods of his absence.

Appeal against the Decree of the Court of the Subordinate Judge, Devakottai, in Original Suit No. 16 of 1957.

A. Sundaram Iyer, for Appellant.

T. R. Srinivasan, for Respondent.

The Judgment of the Court was delivered by

Venkataraman, J.—This appeal has been filed by the plaintiff in O.S. No. 16 of 1957 on the file of the Subordinate Judge's Court, Devakottai, against the judgment and decree dismissing his suit. The suit is for taking accounts of a dissolved partnership and is directed against the first defendant Karuppiah Ambalam. The suit has been dismissed on two preliminary grounds: (*i*) that in part it involved the determination of title to immovable property situate in Malaya, a foreign territory; and (*ii*) limitation.

The following geneological tree will show the relationship of the parties:

Solayappa (died on 19-1-1946)

Ayyachamy (died on 30-3-50)
Married Visalakshi
(2nd defendant)

Minor Dorairaj (Plaintiff)

Periannan *alias* Muthukannu
(died on 14-5-50). Married
Ponnalagi (3rd defendant).

Solaimalai
(4th defendant).

Ramaswami
(5th defendant).

The plaintiff's grandfather Solayappa and the first defendant Karuppiah Ambalam were sons of sisters They carried on a partnership business in Malaya under the name and style of KR PR Mantin Originally the business was at Mantin and later it was in Siramban This partnership is admitted. It is also common ground that Solayappa had 3/4 share and the first defendant 1/4 share Solayappa died on 19th January, 1946 Section 42 of the Partnership Act says, " Subject to contract between the partners, a firm is dissolved by the death of a partner " As pointed out by their Lordships of the Supreme Court in *Commissioner of Income-tax* v *Govindram Sugar Mills*[1], a firm of two partners necessarily gets dissolved on the death of one of the partners and to such a partnership the phrase, "subject to contract between the partners " cannot apply, because a partnership necessarily involves a minimum of two partners Even where the legal representatives of the deceased partner take his place and carry on the business with the other partner, it will only be a new partnership The plaint, however, states inaccurately that there was a contract between Solayappa and the first defendant that the partnership should continue without dissolution even in the event of the death of one of the partners, by the legal representatives taking his place But, in substance, the case in the plaint is that a new partnership came into existence on the death of Solayappa, between his sons Ayyachami and Periannan on the one hand, and the first defendant on the other. Paragraph 13 of the plaint alleges.—

> " He (first defendant) has caused the partnership business KR BR to be continued at Seramban without break and without bringing about dissolution and treating Ayyachamy and Periannan as partners of the continuing business in the place of their deceased grandfather (In the plaint Solayappa is throughout referred to as the grandfather) He caused the continuity of the firm to be recognised and registered according to the requirements of the law of Malaya by introducing their names and carried on the firm under his exclusive directions and management "

This is also made clear in the other paragraphs, like paragraphs 7 and 14.

The plaint further states that Ayyachamy and Periannan were given to drinking and other bad habits and, therefore, Ponnalagi, the wife of Periannan, acting as the next friend of her minor sons, Solamalai and Ramasami, instituted a suit, O S. No 33 of 1948, on the file of the Subordinate Judge's Court, Devakottai, on 3rd November, 1947, for partition In that suit Ayyachamy was the first defendant, Periannan alias Muthukannu was the second defendant and Karuppiah Ambalam, the first defendant in the present suit (O S No 16 of 1957) was the third defendant Two other persons, with whom we are not now concerned, were impleaded as alienees. It will be seen that Ponnalagi and her sons Solamalai and Ramasami are respectively defendants 3 to 5 is the present suit In that suit the assets of the partnership KR PR in Malaya were described in the ' C ' Schedule to the plaint. That suit was compromised on 5th April, 1949 Exhibit A-5 is the certified copy of the compromise Its terms are very important, particularly clause (1). We shall set out clause (1) in original and also give a free translation of all the clauses

> " *இநத நமபரில் பிராதின்* C Schedule-*ல் கண்ட கடை சம்பந்தமாக அடியில கண்டபடி நாங்கள ராஜி செய்து கொண்டிருககிறேம்:*

> *(1) ஷை சிரமபன் கரு பெரி கடையில் 1,2 பிரதிவாதிகளின் தகப்பனர் சோலையன அம்பலததுக்கு 3 பங்கும், 3-ம் பிரதிவாதிககு ஒரு பங்குமாக ஷை கடை நெடுகிலும் நடந்து வந்து ஷை சோலையன் அமபலம இறந்த பிறகு ஷை கூடடு உலவீன மன்னியில முனபஙகு படிக்கே 1,2* and *3 பிரதிவாதிகளுககு கூட்டாக ஷை கடை துயாநது நடந்து வருகிறது* "

> " Regarding the shop set out in the C-Schedule of the plaint, we have compromised as follows —

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1 (1965) 2 I T J 170 (1965) 2 S C J 289 (1965) 3 S C R 488 . A I R 1966 S C 24.

1. The above shop at Siramban was carried on for a long time between Solayan Ambalam, the father of defendants 1 and 2 with three shares, and the third defendant (Karuppiah Ambalam, the present first defendant) with one share. After the death of the said Solayan Ambalam, the above partnership is being carried on without a break as a partnership between defendants 1, 2 and 3 with the shares as before.

2 The remittance of $ 2,000 sent recently from the above shop by the third defendant (first defendant in O S. No 16 of 1957) has been properly settled by looking into the accounts

3 In regard to the taking of accounts otherwise of the said partnership business, after the first and second defendants take out letters of administration after payment of duty to the deceased Solayan Abalam, we shall divide according to our shares the assets of the partnership in specie or their sale proceeds and at that time we shall finalise all the accounts

4. Taking the shares of the shop as four, when the accounts are finally settled as stated in clause (3), the 1½ shares belonging to the family of the second defendant (Periannan *alias* Muthukannu) shall be divided, by the plaintiffs (present defendants 4 and 5) taking one share and the second defendant (their father Periannan taking a half share 1½ shares out of four will be taken by the first defendant (Ayyachamy, father of the present plaintiff). The third defendant (first defendant in O S No 16 of 1957) will take one share (Stated simply, it will be seen that this recognised that the shares of Ayyachamy and Periannan were together three as against the one share of Karuppiah Ambalam, the present first defendant and there is a division *inter alia* between Periannan and his two sons, the two sons being the minor plaintiffs in that suit

5 Since the shop at Siramban is a partnership and its assets are mostly immovable properties in foreign territories, the assets of the said shop are excluded from the suit Hence it is prayed that the Court may record this and remove the C Schedule from the plaint and the third defendant without costs "

The above compromise was signed on behalf of the plaintiffs therein by their next friend Ponnalagi and by the first three defendants in that suit, namely, Ayyachamy, Periannan and Karuppiah Ambalam (present first defendant) The plaint asserts that the above compromise recites what was actually the fact, namely, that the partnership business was carried on without a break even after the death of Solayar Ambalam, as between Ayyachami, Periannan and Karuppiah The plaint further states that the first defendant was throughout in charge of the business in Siramban and particularly after the death of Solayappa, and that the other two partners, Ayyachami and Periannan did not take any interest because of their profligate habits. The plaint charges the first defendant with gross acts of embezzlement Ayyachami the father of the plaintiff died on 30th March, 1950 and Periannan (father of defendants 4 and 5) died on 14th May 1950 Paragraph 18 of the plaint states that the firm became dissolved without any doubt on 30th March, 1950 and still more indisputably on 14th May, 1950 and that the first defendant without handing over the assets to the plaintiff and defendants 4 and 5, misappropriated them The plaint, therefore, prays for account from 18th January, 1946, but that was on the footing that the first defendant utilised the assets of the old partnership See, for instance, paragraph 13 of the plaint, where it is stated that on 12th April, 1947 the first defendant opened a new account for the KR PR. firm by transferring all the assets and liabilities of the firm to the new account

The plaint also refers to three items of properties as *thottam* properties and states that they were the exclusive properties of Solayappa bought with the funds of the joint family of which he was the kartha or manager though the sale deeds for two of those properties stood in the name of the first defendant The accounts of the income of those three properties were no doubt maintained along with the accounts of the KR PR firm, but separately The plaint prayed for an account of the income of those properties as well against the first defendant

Originally the suit was filed with Dorairaj as the first plaintiff and Solamalai and Ramasami as plaintiffs 2 and 3. But at the instance of the plaintiff they were transposed, by an order in I.A No. 184 of 1959, dated 7th April, 1959, as defendants 4 and 5, and that is how they have been described in the above narration as defendants 4 and 5 The explanation for this appears to be that the first defendant settled the claims of defendants 3 to 5 outside Court The plaint was filed on 5th April, 1957, more than three years after 30th March, 1950, the date of the dissolution, according to the plaintiff The delay is sought to be explained on two grounds: (1) the absence of the first defendant from India in Malaya for certain periods which have to be excluded under section 13 of the Limitation Act, 1908 (the Act applicable when the suit was laid); (ii) the plaintiff was a minor. The fifth defendant was still a minor The fourth defendant attained majority on 21st January, 1956 but the suit was filed within three years therefater

The suit was contested by the first defendant on the following grounds: (1) There was no agreement between Solayappa and the first defendant that the partnership should continue even after the death of one of them Further such an agreement is out of question in a case where there were only two partners (2) The partnership came to an end on 19th January, 1946. No new partnership was formed between Ayyachamy, Periannan and the first defendant. (3) The original partnership came to an end on 19th January, 1946 by the death of Solayappa. Ayyachamy and Periannan were competent to give a valid discharge on behalf of their sons, (the plaintiff and defendants 4 and 5) in respect of the accounts of the firm which was dissolved on 19th January, 1946 and no suit having been filed by them within three years of 19th January, 1946, no cause of action survived to the plaintiff or defendants 4 and 5 and the suit was time-barred (4) The *thottam* properties were not the exclusive properties of Solayappa but belonged to the partnership and the first defendant was entitled to 1/4 share in them (5) There was thus a dispute about title to the immovable properties lying in Malaya and even for giving a relief of accounting of the income thereof, the Subordinate Judge's Court, Devakottai, had no jurisdiction The first defendant was not in charge of the firm. Solayappa had been in charge of the firm during his life-time and after him that partnership which was dissolved on his death was wound up, and in the course of such winding up Ayyachamy and Periannan and also their two widows, Visalakshi and Ponnalagi, received payments from the first defendant in full quit of the claims of the plaintiff and defendants 4 and 5 They also were in management. The first defendant was, therefore, not liable to account at all. He did not commit any acts of misappropriation (7) Exhibit A-5 is inadmissible for want of registration According to the first defendant, it does not mean that there was any partnership between Ayyachamy, Periannan and the first defendant On the other hand, it would only show how accounts should be taken of the partnership which had become dissolved on the death of Solayappa Further, Exhibit A-5 contemplates that letters of administration had to be obtained for Solayappa and the suit as framed without obtaining letters of administration was not maintainable.

Several issues were framed, but, as mentioned already, the learned Subordinate Judge dismissed the suit on the preliminary grounds of limitation and jurisdiction On the question of limitation, the learned Judge took the view that no new partnership came into existence as between Ayyachamy, Periannan and the first defendant and that the original partnership got dissolved on the death of Solayappa. He also thought that Exhibit A-5 required registration and that, in any case, it was only a piece of evidence on the question, whether the old business was carried on between Ayyachamy, Periannan and the first defendant As against Exhibit A-5, there were clear statements in Exhibit A-1, the plaint filed in O S. No 33 of 1948, that the partnership between Solayappa and the first defendant had become dissolved on 18th January, 1946 and accounts had to be taken of that dissolved partnership

On the question of jurisdiction he held that it was clear from the decision of the Bench of this Court (Wadsworth and Rajamannar, JJ.) in

Nachiappa Chettiar v. *Muthukaruppan Chettiar*[1], and the Statement of Law in Halsbury's Laws of England (Vol. 6 Hailsham's Edn.) that the Subordinate Judge's Court, Devakottai, could not adjudicate on the title of the *thottam* properties situate in Malaya, and that even the relief of accounting of the income therefrom involved an adjudication of the title of those properties and that consequently the Subordinate Judge's Court had no jurisdiction.

The question of jurisdiction is fundamental, but the position has been considerably simplified, because in this Court the plaintiff has filed a memorandum through his learned Counsel giving up the contention that the *thottam* properties belonged to Solayappa, and accepting the first defendant's contention that the properties belonged to the partnership and that the appellant's grandfather was only entitled to three-fourth share therein. The position therefore is very simple, namely, that here is a suit for taking accounts of a dissolved partnership against a defendant who is resident within the limits of the jurisdiction of the Devakottai Subordinate Judge's Court. The partnership has assets in the shape of immovable properties in Malaya, and there is no dispute about the title of the partnership to those assets, so far as the plaintiff and the first defendant are concerned. Under these circumstances, the principle and commonsense inform us that there can be no objection to the Devakottai Subordinate Judge's Court trying the suit. Once it is ascertained whether any amount is due from the first defendant and if so the quantum thereof, it may well happen that the parties may agree about the valuation of the assets in Malaya and the defendant may pay the proportionate share thereof to the plaintiff in India itself which the plaintiff may accept. In such a case the plaintiff need not go to the foreign Court in Malaya at all. Secondly, even if it is necessary to sell the immovable property in Malaya, it may be done by a receiver appointed by the Subordinate Judge's Court, Devakottai, and, under the rules of Private International Law and the Comity of Nations, the foreign Court in Malaya is bound to recognise the appointment of the receiver. Thirdly, even if it should become necessary for the receiver to remove any impediment or obstruction from any third party in Malaya the receiver can seek the aid of the foreign Court and the action will be tried according to the laws prevailing in Malaya. From any point of view, therefore, there is no possibility of the decree passed by the Subordinate Judge's Court, Devakottai, becoming ineffective or useless. Therefore, it is clear that the Subordinate Judge's Court, Devakottai, will have jurisdiction in such cases. These propositions, which accord with principle and commonsense, of course find place in the leading text books and in several decisions, English and Indian. They will be found collected in the leading text books and digests.

The important principle to bear in mind is that the suit here is essentially an action *in personam* against a defendant who is amenable to the jurisdiction of the Subordinate Judge's Court, Devakottai. It is an accepted principle that in such cases the Court (where he resides) will have jurisdiction to try the action. In fact, in England the principle has been extended even to a foreigner, usually resident abroad, but who happens to come to England even temporarily, provided that the writ in the action is served upon him when he is in England. The law is thus stated in 7 Halsbury, page 6, paragraph 4 (the reference is always to Simonds Edn.).

> "The English Courts have jurisdiction (subject to the exceptions referred to below) to entertain an action *in personom* against any person who is within the jurisdiction at the time when the writ in the action is served upon him, however, transitory his sojourn in England may be."

Again, even though the general principle is that the English Court will not have jurisdiction to try an action involving the determination of title to foreign immovables, there are some exceptions, which have thus been stated at page 33 of Halsbury Vol. 7 :—

1. (1946) 1 M.L.J. 310 : I.L.R. (1946) Mad. 858.

"The English Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title is not directly involved, and provided that such equity does not depend for its existence on the *lex loci* of the foreign immovable Such an equity must be of a personal nature, that is, there must be either a fiduciary relationship or privity of some other kind between the parties for the Courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who have acquired a good title by the local law, or (in the absence of privity between the parties) to impose on a foreign immovable a burden other than that which the local law requires it to bear"

The exceptions do not obviously apply here. It is on the above principle that it has been held that "the English Courts have jurisdiction to order the specific performance of any contract relating to foreign immovables which the *lex loci rei sitae* allowed to be carried into effect." (see page 36)

Again, at page 32 it is stated

"The English Courts have jurisdiction to order an account of rents and profits between tenants in common of a foreign immovable"

At page 37 it is stated

"The English Courts have jurisdiction to order an account of the rents and profits of a foreign immoveable against any person liable to account in respect thereof, and in a suitable case a receiver will be appointed The Court does not, and cannot, by its order put a receiver in possession of foreign immoveables, but any party to the action in which the order is made who prevents the necessary steps from being taken to enable the receiver to take possession according to the *lex loci rei sitae* is guilty of contempt"

Again, at page 59 it is stated:

"The English Courts have (with very few exceptions) jurisdiction to entertain an action relating to a contract, wherever made, in all cases where the parties are effectively before the Court, as where personal or substituted service of the writ has been effected on the defendants in England . "

Cheshire in his Private International Law, in Chapter XVI (page 523 of the Seventh Edn and page 582 of the Fifth Edn) states—

"The objection that a Court has no jurisdiction owing to the foreign situs of the *res litigiosa* is fatal to an action *in rem*, but is no answer to an action *in personam*."

He quotes the following passage from Lord Sellborne in *Ewing* v. *Orr Ewing*[1].

"The English Courts of Equity are, and always have been Courts of conscience operating *in personam* and not *in rem* and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction"

We may also quote here the dictum of law of Blackburn, J , in the same case (page 46)

"The jurisdiction of the Court of Chancery is *in personam* It acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he owes to the plaintiff"

Cheshire also states, at pages 505 and 506 of the Seventh Edn. (page 559 of the Fifth Edn.), two exceptions to the principle that a possessory or proprietary title to foreign land is not justiciable in England The first is stated thus

1. (1883) 9 A C 34 at 40 53 L J Ch 435

"If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the Court, in the exercise of its jurisdiction *in personam* will not shrink from ordering him to convey or otherwise deal with foreign land"

This doctrine was established in *Penn* v *Baltimore*[1] We are not concerned with the other exception

The same principle is also stated in Dicey's Conflict of Laws (Seventh edition) at pages 151, 155, and 169

Kerr on Receivers, Thirteenth Edn (1963) states (at page 93)

"It is not necessary, in order that the Court may have jurisdiction to appoint a receiver, that the property in respect of which he is to be appointed should be in England, or indeed, in any part of Her Majesty's Dominions, though the extent to which the receiver may be able to obtain possession of the property depends on the *Lex Loci* Persons have been appointed to receive the rents and profits of real estates and to convert, get in and remit the proceeds of property and assets, in cases in which the estate or property in question has been in Ireland, in the West Indies, in India, in Canada, in China; in Italy; in America, in New South Wales; in Jersey, in Brazil and in Peru. But the Court will not make such an order if it would be useless Although the Court has no power of enforcing its orders and decrees in places beyond the jurisdiction, the receiver may be authorised to proceed abroad, or to appoint an attorney, and a party to the cause who resists him or his attorney will be guilty of contempt"

Similarly, in 32 Halsbury (at page 410) dealing with Receivers, it is stated:

"A receiver may be appointed of property situate in a foreign country Although the Court is unable to enforce delivery of possession it may direct an enquiry as to the best means of obtaining possession and make any necessary order on a defendant within its jurisdiction It is usual to authorise the Receiver to appoint an agent to act in the foreign country The Court will recognise a person in the position of a receiver appointed by a foreign Court"

We shall now refer to some of the cases chronologically *Houlditch* v *Marquess of Donegall*[2], was a case decided as early as 1834 by the House of Lords The head-note sums up the position correctly and is as follows .—

"The creditors of a person resident in Ireland, filed a bill in the English Court of Chancery, and obtained a decree for an account, etc and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. Held that the judgment of the Court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *prima dacie* evidence of right in the party who had obtained the judgment. Held also that this House could either remit the case with directions, or appoint a Receiver, and take such other proceedings as the Court of Chancery in Ireland might have done"

A reading of page 481 shows that the House of Lords ordered a Receiver to be appointed and further directions were reserved to the Court of Chancery in Ireland

In *Bunbury* v. *Bunbury*[3], the English Court directed the Master to appoint a manager of the estate in a foreign territory in the West Indies

Hinton v *Galli*[4], was a case of 1854 where the Master of the Rolls appointed a Receiver for the estate of the deceased Galli situate in Italy and authorised the Receiver to appoint an agent in Italy

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1 (1750) 1 Ves Sen 444
2 (1834) 2 Clark and Finnelly's Reports 470 6 E R 1232
3 1 Beavan-1, 318 at 336 (1839) 8 L J. Ch 297 at 302
4 24 L J Ch 121

Hendrick v. *Wood*[1], was a decision of the Vice-Chancellor in 1861, and it is an interesting case, because it resembles ours The plaintiff wanted *inter alia* to realise the remaining assets of a firm, the assets being situate in Jamaica, and wanted a receiver to be appointed The head-note correctly sums up the position

"The plaintiff being in England, filed a bill for an account against the executors of a deceased partner, some of whom were in England, but acting in concert with the others, who were in Jamaica; the partnership property being also in Jamaica; —Held, upon a plea to the jurisdiction by the executors resident in Jamaica, that the suit was properly instituted in this country (England)"

Then comes the decision of the House of Lords in 1883 in *Ewing* v. *Orr Ewing*[2]. We have already quoted from the speeches of Lords Selborne and Lord Blacburn. It was held that the English Court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English, and that as no proceedings were pending in a Scotch Court by which the interests of the plaintiff could have have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course.

In *Bolton* v. *Curre*[3], a case of 1894, the English Court appointed a receiver of a foreign property in Ireland.

In *Maudslay* v. *Maudslay Sons and Field*[4], it was stated :—

"It is well settled that the Court can appoint receivers over property out of the jurisdiction This power, I apprehend, is based upon the doctrine that the Court acts *in personam* The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. See *Keys* v. *Keys*[5], where special directions were given to a receiver as to the best mode of getting in an Indian debt; and *Smith* v *Smith*[6] where it was pointed out that a receiver of property in Jersey and in France would have to recover possession according to the laws of these countries ; and in *Houlditch* v *Marquis of Donegal*[7], the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England by which a receiver had been appointed over estates in Ireland"

Kerr on Receivers also refers to other Instances, which are found collected in Seton's Judgments and Orders (Seventh Edn. at page 776, etc) where receivers were appointed of foreign properties

We shall now refer to some of the Indian decisions. In *Durgadas* v *Jai Narain*[8], a suit was brought for dissolution of a partnership in the Aligarh Court The cause of action arose within the jurisdiction of that Court. The parties were residing within that jurisdiction. The defendant, however, pleaded that the Court had no jurisdiction because the factory which belonged to the parties was situate outside the jurisdiction of that Court. The trial Court upheld this contention and ordered the plaint to be re-presented to the proper Court That decision was affirmed in appeal In revision to the High Court, the learned Judges set aside the orders of the Courts below and held that the Aligarh Court had jurisdiction They pointed out that the Court would have jurisdiction (under section 20, Civil Procedure Code) unless the jurisdiction was excluded by section 16, but the jurisdiction was not so excluded because there was no dispute about the title to the immovable property which was admitted to be partnership property. It was pointed out that section 16 (*a*) relating to recovery of immovable property would apply only to a case where the title of the plaintiff is denied by the defendant and the plaintiff seeks to

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1. 30 L J Ch 583
2. 9 A C 34 . 53 L J. Ch. 43
3. (1894) W N 122
4. (1900) 1 Ch 602 at 611.
5. (1839) 1 Beav. 425.
6. (1853) 10 Hare, App. 71
7. (1834) 1 Clark and Finnely's Reports, 470.
8. (1919) I L R 41 All 513

recover the property from the defendant For the same reason clause (*d*) of section 16 would not apply because there was no dispute about the right to immoveable property or interest in immovable property. The principle of this decision directly applies to the facts of the case before us, in view of the memorandum of the plaintiff filed in this Court giving up his exclusive claim to the *thottam* properties in Malaya.

Ismailji v *Ismail Abdul*[1], was a case where there was a partnership consisting of three persons, the plaintiff the first defendant and one Sulemanji It carried on business at Chanchai in Delagoa in South Africa It was managed by the first defendant at Chanchai In 1902 Sulemanji died The plaintiff filed the suit in Bulsar in Surat District for dissolution of the partnership and for taking accounts Both the plaintiff and the defendants were within the jurisdiction of the Bulsar Court Objection was, however, taken that the Court had no jurisdiction over the property of the partnership situate in South Africa and could not appoint a receiver to take possession thereof This objection was upheld by the trial Court (Subordinate Judge). But on appeal the learned Judges of the High Court held that the Bulsar Court had jurisdiction They observed —

> " Section 20 of the Civil Procedure Code clearly gives the Courts jurisdiction to decide any suit within the local limits of whose jurisdiction the defendant resides, subject to limitations prescribed in sections 16 to 19 But it must be admitted that none of those limitations apply to this suit If therefore, the plaintiff and the defendant were within the jurisdiction of the Bulsar Court, the plaintiff could file a suit against, the defendant for dissolution of partnership, even although that partnership commenced and was carried on in foreign territory It might be difficult to take the accounts of the partnership. That is purely a matter for the plaintiff's consideration, while there can be no doubt that a Court can appoint a receiver of property outside its jurisdiction and even in foreign territory, although the receiver in endeavouring to take possession of the suit property will have to apply and will be subject to the law of the territory in which the property is situated But all those questions have nothing to do with the question of jurisdiction of the Bulsar Court, which is *prima facie* entitled to pass a decree in favour of the plaintiff against the defendant for dissolution of partnership and for accounts unless the Indian law of limitation bars the plaintiff's remedy in the Indian Courts "

This decision, again, directly applies to our case.

The above decision was followed by the same High Court in *Chandulal Madhavlal* v. *Maneklal Lalluram*[2], and a receiver appointed by a Court of the Baroda State was recognised as a proper party for the purpose of filing suits in the British Courts

In *Sunder Singh* v *Ganga Ram*[3], the High Court upheld the order of appointment of receiver by the British Court in respect of property situate in an Indian State and observed that the proper course would be to direct the defendant, who was admittedly in possession of the property to hand over the property to the receiver Some of the cases discussed by us were referred to and followed

There is a full discussion of the legal position in *Prithi Singh* v *Thakur Ganesh Prasad Singh*[4], where the question arose, on an application filed by the mortgagor under the provisions of the United Provinces Agriculturists Act, 1934, for a declaration that the mortgage of the properties situate in Banares District and in Banares State (then a native State) had become discharged on account of the mortgagee having been in possession of the properties for the period prescribed by the Act. The suit was brought in the Court in Banares District and it was held that, though the relief of redemption of the property in Banares State could not be given in view of the provisions of section 16 of the Civil Procedure Code, the Court in Banares District had jurisdiction to order an account to be taken of the rents and profits

1. (1921) I L R 45 Bom. 1228.
2. (1931) I L R 55 Bom 309
3. (1938) I L R 19 Lah 305
4. (1951) I L R 2 All 703 at 712

derived from both sets of properties for the purpose of giving the relief which the applicant actually desired It was in that connection that the whole question of the jurisdiction of a Court in respect of property in foreign territory was discussed.

The decision in *Nachiappa Chettiar* v *Muthukaruppan Chettiar*[1], relied on by the learned Subordinate Judge, is clearly distinguishable The suit there was for partition and some of the assets were immovable properties in Ceylon where the joint family had been carrying on money-lending business It was a trading family. There was also dispute about title to some of the immovable properties in Ceylon. One of the objections of the defendant was that the Subordinate Judge's Court, Devakottai, had no jurisdiction in respect of the properties in Ceylon This contention was upheld by the trial Court (Subordinate Judge's Court, Devakottai), and relief was given by the trial Court only in other respects The plaintiff preferred an appeal in respect of the Ceylon properties His learned Counsel sought to get out of the difficulty of jurisdiction by urging that the immoveable properties in Ceylon belonged to the partnership and what was sought was only a division of the assets of the partnership and, if so, the Subordinate Judge's Court, Devakottai, would have jurisdiction The learned Judges recognised that in the case of a bare partnership owning properties in Ceylon, a suit for the dissolution of the partnership and accounts could be brought in Devakottai, but rejected the contention on the ground that the case before them was that of a trading family and in the case of a trading family even the partnership assets must be deemed to be joint family properties It was therefore a simple case of partition of immovable properties belonging to the joint family and from that point of view the Subordinate Judge's Court, Devakottai, had no jurisdiction In the present case, however, the members forming the partnership did not all belong to a joint family, because the first defendant was a stranger Hence, that decision does not apply On the contrary, it is pertinent to remark that the very decision recognises that in the case of a partnership, such as the one we have here, it is permissible to bring a suit for accounts of the dissolved partnership, even though some of the assets may be in the shape of immovable properties outside India where there is no dispute about title The principle on which jurisdiction of the Indian Court has been recognised is that the normal remedy of the parties is only to sell the assets of the partnership and to a share thereof after meeting the debts That principle has been affirmed by their Lordships of the Supreme Court in *Narayanappa* v *Krishnappa*[2]

In *Ramanathan Chettiar* v *Narayanan Chettiar*[3], a partition suit was brought by the sons of a joint Hindu family against their father Some of the properties were in Ceylon and in Burma In respect of them the plaintiffs did not seek any partition, but prayed for an account of the income therefrom Mack and Krishnaswamy Nayudu, JJ held that from the date of severance of the joint family that particular relief could be awarded on the principle that it was an action *in personam*, arising out of a simple agency or equity, and they distinguished *Nachiappa* v *Muthukaruppan*[1].

For the above reasons we have no hesitation in holding that in this case the Subordinate Judge's Court, Devakottai, had jurisdiction to entertain the suit and, if it becomes necessary, the Court would have jurisdiction to appoint a receiver to realise the assets of the partnership (including immovable properties) situate in Malaya

Before leaving this point of jurisdiction, it is necessary to refer to two matters which were adverted to during the arguments It was stated by Sri T R Srinivasan, the learned Counsel for the contesting respondent (first defendant), that a suit had been brought in Malaya for the same relief which the plaintiff has sought in the present suit At that stage the learned Counsel did not give any particulars of the suit, and Sri A Sundaram Iyer, the learned Counsel for the appellant explained

1 (1946) 1 M L J 310 · I L R (1946) Mad 858

2 (1966) 2 An W R (S C) 60 : (1966) 2 M L J (S C) 60 (1966) 3 S C R 400 : (1966) S C J 490

3 (1955) 2 M.L J. 414

that the suit referred to was a suit for accounting of the income from the *thottam* properties on the footing that they belonged exclusively to Solayappa and thereafter to the plaintiff and the others, and that the suit had nothing to do with the taking of accounts of the dissolved partnership Sri Sundaram Iyer further admitted that in view of the memorandum filed by the plaintiff before us in this Court, accepting the contention of the first defendant that the *thottam* properties also belong to the partnership and the relief of accounting which the plaintiff would get on that basis in the present suit, the plaintiff would necessarily have to abandon the suit filed in Malaya for that purpose This was what took place before we reserved judgment But after we reserved judgment, Sri T R Srinivasan took our permission to file the papers in Civil Suit No 120 of 1966 on the file of the High Court in Malaya It was explained by Sri Sundaram Iyer that that suit was filed by the plaintiff after the Subordinate Judge of Devakottai dismissed the present suit, O S No 16 of 1957, and for the same relief of accounting of the dissolved partnership Sri Sundaram Iyer explained that the plaintiff adopted that course, because he could not be certain that this appeal filed by him would be successful Sri Sundaram Iyer further pointed out that because of the pendency of this appeal, the defendant himself had obtained stay of the trial of the said suit, C S No 120 of 1966 It is obvious that the suit, C S. No 120 of 1966, cannot be an impediment to the disposal of this appeal and a further trial of the suit, O S No 16 of 1967.

That brings us to the point of limitation As already pointed out, the real case of the plaintiff is that after the death of Solayappa on 19th January, 1946, a new partnership came into existence between Ayyachami, Periannan and the first defendant and that it was dissolved on 30th March, 1950, the date of the death of Ayyachami The learned Subordinate Judge finds that there was no such partnership and that the only partnership was that between Solayappa and the first defendant which came to an end on 19th January, 1946 In coming to this conclusion he was mainly influenced by the recitals in the plaint in O S No 33 of 1948 (Exhibit A-1) and he was disinclined to attach any importance to Exhibit A-5 and, in fact, in his opinion, Exhibit A-5 was inadmissible for want of registration We shall presently show that this objection of non-registration is not valid and that Exhibit A-5 is admissible If once Exhibit A-5 is held to be admissible, it is absolutely clear therefrom that there was a partnership between Ayyachami, Periannan and the first defendant and in that partnership Ayyachami and the sons of Periannan were also entitled to a share The first clause of Exhibit A-5 clearly recites that the original partnership was carried on even after the death of Solayan Ambalam without a break but as a partnership between the three defendants with their shares as before The share of Solayappa was three and that of the first defendant was one The share of Solayappa was further sub-divided, Ayychami having 1½ shares and Periannan's branch having three shares In Periannan's branch, Periannan was entitled to a half and his two sons were entitled to one share In our opinion Exhibit A-5 constitutes a contract binding on the parties thereto, including the first defendant and it is therefore not open to him to assert anything to the contrary

It has been argued by Sri T R. Srinivasan, the learned Counsel for the first defendant that Exhibit A-5 only means that the accounts had been settled till then, and cannot mean that the old partnership was continued without a break upto 5th April, 1949 We are entirely unable to accept this argument in view of the clear recital in clause (1) of Exhibit A-5 and the further recital of the shares of the new partners in clause (4) After all, there is nothing surprising in the old partnership continuing for practical purposes without a break, though the partners would be different, the assets of the old partnership being utilised for the new partnership Instances of this can be found in *Ahinsa Bibi* v *Abdul Kader Saheb*[1] and *Mt Sughra* v *Babu*[2], where it is pointed out that the assets of the old partnership would form the

1 (1902) I L R 25 Mad 26 2. A I R. 1952 All. 506.

capital contribution of the new partnership and in order to determine the capital contribution it may be necessary incidentally to take an account even of the old partnership

Sri T R Srinivasan, however, contends that there was no continuance of the partnership after the date of Exhibit A-5 (5th April, 1949) That question has not been gone into yet. We propose to remit that question for trial by the trial Court, giving an opportunity to both sides to adduce the necessary evidence. But that can only relate to what happened after 5th April, 1949 So far as what happened between 19th January, 1946 and 5th April, 1949, Exhibit A-5 is clear and cannot be contradicted by the first defendant The parties must proceed on the footing, and likewise the Court must proceed on the footing, that there was a partnership without a break from 19th January, 1946 to 5th April, 1949, and that the assets of the old partnership were utilised for that purpose.

Once we arrive at the above position, it will be seen that the suit is in time even if it should be held hereafter that there was no partnership after 5th April, 1949. We shall refer to that later. We proceed straightaway to a consideration of the important question whether Exhibit A-5 is inadmissible for want of registration The objection is that it requires registration under section 17 (1) (*b*) of the Indian Registration Act of 1908 Section 17 (1) (*b*) reads as follows —

"17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which and if they have been executed on or after the date on which, Act XVI of 1864 or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877 or this Act came or comes into force, namely .—

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property"

It is urged that Exhibit A-5 declares the rights of the parties in immovable properties though in Malaya and requires registration under section 17 (1) (*b*). In passing it may be noted that no objection has been taken on account of the non-registration of Exhibit A-5 in respect of other properties situate in British India and covered by the other Schedules in the suit, O S. No. 33 of 1948, presumably because they were the subject-matter of the suit and registration would be unnecessary in view of section 17 (2) (*vi*) of the Act In our opinion, there is absolutely no substance in this objection that Exhibit A-5 requires registration in respect of the immovable properties of the partnership in Malaya. There are at least three reasons, each of them good, for our view (*i*) it merely recites the pre-existing right of the parties in the immovable properties of the partnership in Malaya, (*ii*) it does not deal with any specific immoveable property and allot it to one or the other of the parties; and (*iii*) the Indian Registration Act of 1908, and in particular section 17 (1) (*b*) would apply only to India and cannot apply to immovable properties situate in Malaya.

It will be convenient to take up reasons (*i*) and (*ii*) together In *Bageshwari Charan Singh* v *Jaganath Kuari*[1], their Lordships of the Privy Council approved the view of West, J, in an early Bombay case that the word 'declare' occuring in section 17 (1) (*b*) will apply only to those instruments which bring about a definite change of legal relation to the property by an expression of will embodied in the document referred to and will not apply where it merely recites the pre-existing facts In the case before West, J, in *Sakha Ram Krishnaji* v. *Madan Krishnaji*[2], the document in question acknowledged the pre-existing title of the eldest brother *M* of the executants to the sites on which the brother *M* was putting up houses. West, J, in holding that it did not require registration observed·

1 (1932) 62 M L J 296 : I L R 11 Pat 272 : L.R 59 I A 130 : A I R 1932 P C. 55

2. (1880) I L R. 5 Bom 232

"Here, however, the document is not itself one which declares a right in immovable property, in the sense probably intended by section 17 There 'declare' is placed along with 'create,' 'assign' 'limit,' or 'extinguish' a 'right,' 'title or interest,' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to I think this is equally the case with the word 'declare' It implies a declaration of will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense, but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section"

Their Lordships of the Privy Council observed .—

"Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West, J, is right. The distinction is between a mere recital of a fact and something which in itself creates a title The distinction has been acted on in cases connected with mortgages by deposit of documents of title . . In the present case the statement in the petition of the respondent did not create any right in the Thakur It merely acknowledged as a fact that such right was his. There was therefore no necessity for registration."

The above decision was followed with approval by their Lordships of the Supreme Court in *Nachiappa Chettiar* v *Subramaniam Chettiar*[1], and *Narayanappa* v. *Krishnappa*[2], already referred to, where the document was construed as merely reciting a fact which had taken place earlier. It will be seen that in the present case there was no dispute at the time of the compromise in O S No 33 of 1948 about the shares of the parties Clause (4) there merely recited what was common ground between the parties, and did not bring about any change in the legal relation of the parties with respect to the properties.

Secondly, Exhibit A-5 did not allot any specific item of immovable property to any of the parties It does not even say that the properties have necessarily to be divided *in specie* in the respective shares It contemplated that the properties might have to be sold and accounts finalised which is the normal mode of working out the rights of partners, as pointed out in *Narayanappa* v *Krishnappa*[2], already referred to. According to Exhibit A-5, even if it should become necessary to divide the properties *in specie*, that had to be done by any instrument which was to come into existence later when the accounts were finally settled It did not therefore create or declare any interst in any particular item of property in any of the parties

Thirdly, it is clear that the Indian Registration Act, 1908 cannot apply to immovable properties in Malaya Section 1 (2) of the Act says that the Act extends to the whole of India except the State of Jammu and Kashmir, and it is provided that the State Government may exclude any districts on tracts of country from its operation The Act therefore does not purport to apply to any immovable properties outside India The scheme of the Act also confirms this Section 17 says that the documents specified therein shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, the Registration Acts of 1864, 1866, 1871, 1877 or 1908 came or comes into force Section 5 of the Act says that for the purposes of the Act the State Government shall form districts and subdistricts Section 5 of the Act says that for the purposes of the Act the State Government shall form districts and sub-districts Sections 28 to 31 contain important provisions about the place of registration In the case of documents relating to immovable property, they shall normally be presented for registration in the office of the Sub-Registrar within whose sub-district

1 (1960) 1 An W R (S C) 101 (1960) 1 M L J (S C) 101 (1960) 2 S C R 209 : (1960) S C J 416 at 424

2 (1966) 2 An W R (S C) 60 (1966) 2 M. L J (S C) 60 (1966) 2 S C J 490

the whole or some portion of the property to which such document relates, is situate. Sections 64 and 65 contemplate that the Sub-Registrar, on receiving a document relating to immovable property, shall send copies of the registered deed to every other Sub-Registrar in whose jurisdiction any part of such property may lie The idea is obviously to make the registration complete to anybody who wants to inspect the title These provisions are reinforced by section 49 which says that no document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered, shall affect any immovable property comprised therein, etc. These provisions, particularly the provisions about the place of registration, are totaly inappropriate in the case of a document like Exhibit A-5 dealing with immovable properties in Malaya. The Indian Registration Act of 1908 does not and cannot prescribe in which place such documents can be registered The importance of the place of registration can be recognised from the fact that if no part of the properties lies in the jurisdiction of the Sub-Registrar to whom the document is presented, the documents cannot be registered by that Sub-Registrar and, if for the purpose of securing registration some property is fictitiously mentioned, the registration will be void This has been held by the Privy Council in *Harendralal Roy Chowdary* v. *Haridasi Debi* [1] *See* commentary in Mulla's Registration Act, under section 28. In short, the object of the legislation is only to provide for compulsory registration in respect of immovable property in India so that the title may be clear, and it is no concern of the Indian Legislature to legislate with respect to the title to immovable properties in Malaya.

This position is also settled in Private International Law. In 36 Halsbury page 430, the law is stated thus —

> " Statutes relating to land are presumed to have been intended to bind all land within the territory to which they extend, but not land situated elsewhere."

As authority for the latter position it has quoted the decision of the House of Lords in *British South Africa Co.* v *Companhia De Mocambique*[2] There a suit was brought in England by the plaintiff to recover damages for a trespass said to have been committed by the defendant-company to the plaintiff's mines situate in South Africa. The reliefs of declaration of title and injunction which had been originally prayed for were given up The House of Lords held that the question of title to properties situate in South Africa was involved and that the English Court could not try such a suit Their Lordships quote Story's Conflict of Laws Story himself quotes the following landguage of Wattel ·

> " In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends "

We have seen that this is also what has been stated in 7 Halsbury, at pages 30, 31, etc.

The same position is reiterated in the other leading text books · Craies on Statute Law ; Maxwell , Dicey's Conflict of Laws , and Cheshire's Private International Law Thus in Craies on Statute Law, Chapter XVII, page 448 (Sixth Edition) it is stated

> " All the authorities in England and the United States recognise in its fullest import the principle that real estate or immovable property is exclusively subject to the laws of the Government within whose territory it is situated It is subject to the *lex situs* "

Similarly in Maxwell, in Chapter VI, it is stated ·

> " Another general presumption is that the Legislature does not intend to exceed its jurisdiction. Primarily legislation of a country is territorial " See page 138, etc).

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1. (1914) I L R. 41 Cal 972 (P C) : L.R. 41 I A 110 27 M L J. 80 : 23 I.C. 637.
2. L.R. (1893) A C 602 (H.L)

The same position is stated in Dicey's Conflict of Laws in several places; for instance (Seventh Edition) Introduction (page 4) rule 18 (pages 147 to 152) rule 85 (page 512, etc.)

In Cheshire (Seventh Edition) the law is to be found in pages 503 to 505, among other pages

It is unnecessary to refer to the other English decisions Turning to the decisions in India, there seem to be only a few In *Venkatappayya* v *Venkata Ranga Row*[1] the plaintiffs sued for the recovery of the Zamindari of Munagala situated in Krishna District from the second defendant who was in possession claiming to be the duly adopted son of the daughter of the late Zamindar who represented the eldest branch, marked A in the genealogical tree On the question of adoption it was found by the learned District Judge who tried the suit that there was a written authority to adopt given to the widow of the late Zamindar The late Zamindar and his widow were domiciled in the then Nizam's dominions The law of Hyderabad did not require registration of the authority to adopt but it was contended on behalf of the plaintiffs that nevertheless it had to be registered under section 17 (*b*) of the Indian Registration Act of 1908, because claim was made to immovable property in Krishna District in British India on the basis of that written authority to adopt The learned District Judge found that the authority to adopt was registered in British India within four months of its being brought into British India under the provisions of section 26 of the Registration Act The learned District Judge decreed the suit The plaintiffs preferred the appeal It was heard by Wallis, C J, and Sadasiva, Ayyar, J. Wallis, C J., held that the authority to adopt in that case did not require registration under the Indian Registration Act He observed :—

"The first question which arises is, whether the provision in section 17 of the Indian Registration Act which requires authorities to adopt not contained in a will to be registered, has any application to an authority to adopt given in Hyderabad, outside British India, by a subject of that State domiciled there. If not, such an authority is a not 'document required by section 17 to be registered' within the meaning of section 49 of the Act, and it not affected by the provisions of that section Now the limits of legislative authority are territorial, and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects."

At page 302 he observed —

"That (section 17 (3)) is a provision affecting status The Indian Legislature has no authority to legislate as to the status of the subjects of Native States domiciled in such States and this provision cannot in my opinion on the well established rules of construction be read as extending to an authority to adopt conferred in Hyderabad by a subject of that State domiciled there, whose only connection with British India was that his wife owned property there. Questions of the validity of adoptions made outside British India by persons who are not British subjects may arise in our Courts, not only in connexion with claims to succeed to immovable property situated in British India, but also in " other ways too numerous to mention, and it would in my opinion be altogether opposed to the accepted cannons of construction to attribute to the Indian Legislature when it inserted in the Registration Act what is now section 17 (3) an intention to interfere in any way with the question of such adoptions which is a matter outside its competence For these reasons, I am of opinion that the provisions of the Indian Registration Act did not apply to the authority to adopt the second defendant, and that it is unnecessary to consider the further question whether these provisions were in fact complied with."

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1. (1920) I.L R. 43 Mad. 288 38 M.L J 149

Sadasiva Ayyar, J., also was of the opinion that section 17 (3) of the Act could not apply to the document in that case and that primarily section 17 (3) would only apply in respect of authorities to adopt executed by persons domiciled in British India. He further observed —

"As regards the concession given in section 26 to have certain documents, including an authority to adopt executed out of British India, presented for registration within four months after it is brought into British India, it was, in my opinion, intended to meet the case of a person domiciled in British India travelling abroad (in Europe or America, etc.), or even in a Native State on a pilgrimage and suddenly finding himself in a bad state of health, executing an authority to adopt in favour of his wife to be used by her."

Though on the above view it would seem to have been unnecessary to consider the further questions, the learned Judge considered the further question and agreed with the learned District Judge that the document was presented for registration within British India within four months after its arrival in India and that the presentation of the document by the natural father of the second defendant who was then a minor was proper presentation by a representative of the minor for the purpose of the Act (sections 32, 40).

The decision on the last point was affirmed by their Lordships of the Privy Council. The decision is reported in *Venkatappayya* v. *Venkata Ranga Rao*[1]. The appeals of the plaintiffs were dismissed by the Privy Council on that basis. Because the appeals could be dismissed on that short ground, their Lordships did not think it necessary to discuss the further question whether really the authority to adopt did not require registration in India. They observed —

"Neither is it necessary to discuss the important but somewhat abstruse question, whether the respondent being at that time resident in and subject of the State of the Nizam, can rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption."

From this it cannot be urged that their Lordships meant to throw any doubt on the findings of Wallis, C.J., and Sadasiva Ayyar, J., that the Indian Registration Act had no extra-territorial jurisdiction. In any case, it is clear that the Indian Registration Act could not prescribe for the registration of a document like Exhibit A-5, in so far as it deals with immovable properties situate in Malaya.

Sukriti Bala v. *Hemanta Kumar*[2], was a case where in execution of a money decree the decree-holder agreed to accept a lesser sum of Rs. 9,000 and on behalf of the judgment-debtor, his wife the appellant offered security of her immovable property. The decree-holder sought to proceed against the appellant in respect of her property. Objection was taken on the ground that the charge created by the compromise had not been registered. The objection was repelled on the ground that the provisions of the Indian Registration Act did not apply to the area where the decree in question was passed or the adjustment was recorded, because that area was the Khasi and Jaintia hill tracts. This is a direct decision on the point.

In *Ramanathan Chettiar* v. *Somasundaram Chettiar*[3], the question was one of limitation in a suit on a mortgage executed and registered in Burma in respect of properties there by persons who were of Indian domicile (Ramanathapuram District). The creditors gave up their security and claimed only personal relief against them in the District Court of Ramanathapuram. One of the acknowledgments by the debtors was dated 12th June, 1941, and the next acknowledgment was 31st March, 1947. If Article 115 applied the limitation was three years, but if Article 116 applied the limitation would be six years. That turned on the question whether the mortgage document could be deemed to be registered within the meaning of Article 116.

1. I.L.R. (1929) 52 Mad. 175 (P.C.): L.R. 56 I.A. 21: 56 M.L.J. 218.
2. A.I.R. 1957 Assam 153.
3. (1964) 2 M.L.J. 256: I.L.R. (1964) 1 Mad. 611.

Ramachandra Ayyar, C.J., and Ramamurti, J., held that the word 'registered' occurring in Article 116 meant 'registered' under the law in force in India and since the document was not registered according to the law in India, Article 116 would not apply and so the suit was time-barred. This may be taken to be a converse of the case before us, but the underlying principle is of some relevance in the present case.

In the result we hold that Exhibit A-5 does not require registration. It is admissible and creates a binding contract, namely, that there was a partnership between Ayyachami, Periannan and the first defendant, from 19th January, 1946 upto 5th April, 1949 at any rate. We shall consider the question of limitation on the assumption more favourable to the first defendant, namely, that there was no partnership after 5th April, 1949. Article 106 will apply. The suit would normally have to be brought within three years from 5th April, 1949, but the suit was filed on 5th April, 1957. Section 13 of the Limitation Act will, however, come to the rescue of the plaintiff. It says that the time during which the defendant has been absent from India shall be excluded. Paragraph 25 of the plaint says :—

> " The plaintiff understands that the 1st defendant has been absent from India in Malaya from 17th March, 1947 to 19th May, 1948, 25th August, 1948 to 29th June, 1952 and from 20th January, 1955 to 24th December, 1956 both days inclusive."

The written statement does not specifically traverse this and hence under Order 8, rules 3 to 5 the first defendant must be deemed to have admitted the periods of his absence. Apart from this, the learned Subordinate Judge finds in his judgment, with reference to the several exhibits, as follows (page 10) :

> " . . . . . the first defendant was in Malaya from 17th March, 1947 to 19th May, 1948. He again left India on 13th August, 1949, and returned to India on 29th June, 1952. He again went to Siramban on 23rd January, 1955, and returned to India on 24th December, 1956. These particulars are available from Exhibits A-30, A-31, A-32, B-20, A-63, A-84 and A-85."

This finding was not challenged before us by the first defendant's learned Counsel. We accept it, though the periods are somewhat shorter than the periods mentioned in the plaint. Even taking these reduced periods, it will be seen that they work out to a period of five years, eleven months and nineteen days of absence from India. If this is excluded, the suit is in time, even taking 5th April, 1949, as the starting point. Of course, *a fortiori* the suit would be in time if the partnership had continued till 30th March, 1950. We would add that the benefit of this reasoning on the question of limitation will enure for the benefit of the second defendant as well, if she has a share.

A minor contention of the learned Counsel for the first defendant is that letters of administration have not been taken out for the deceased Solayappa as contemplated in Exhibit A-5 and that, till they are taken out, the suit cannot proceed in the Subordinate Judges Court, Devakottai. Sri Sundaram Iyer for the appellant stated that letters of administration had been taken out to the estate of the late Solayappa by the first defendant himself. We do not think it necesary to go into that question, because in our view, even if letters of administration have not been taken out so far, that will not be an impediment to the jurisdiction of the Subordinate Judge's Court, Devakottai. If necessary, letters of administration can be taken from the Malaya Court in due course.

A more substantial contention, however of the learned Counsel for the first defendant is that, even if we should find, on the basis of Exhibit A-5, that there was a partnership between Ayyachami, Periannan and the first defendant from 19th January, 1946 to 5th April, 1949, we should not further find straightaway that the first defendant was liable to account. He submits that Ayyachami and Periannan also took part in the management and shared the proceeds. This question has not

yet been gone into and must also be remitted for trial by the learned Subordinate Judge

The learned Counsel further contends that, as a matter of construction, Exhibit A-5 itself provides that the partnership between 19th January, 1946 and 5th April, 1949, should be wound up by all the parties being in management of the properties without anyone being liable to account exclusively He submits that factually also each of the parties was in possession of some property or the other and that consequently the first defendant is not liable to account This is contested by the learned Counsel for the appellant This question again is left open

Accordingly, we set aside the judgment and decree of the learned Subordinate Judge and we record our findings as follows —

(*i*) The suit is maintainable in the Subordinate Judge's Court, Devakottai.

(*ii*) Exhibit A-5 constitutes a valid contract on the basis of which the parties must proceed, namely, that there was a partnership between Ayyachami, Periannan and the first defendant even from 19th January, 1946 upto 5th April, 1949, and that the shares are as indicated in Exhibit A-5 Since the first defendant has settled the matter with defendants 3, 4 and 5 the dispute will be outstanding only as between the plaintiff and the second defendant on the one hand and the first defendant on the other.

(*iii*) We find the suit is within time.

The suit is remitted for trial on the further points of dispute between the parties and in particular the following :

(*i*) Whether the partnership continued from 5th April, 1949 to 30th March, 1950 ?

(*ii*) Which of the parties are liable to account, in particular whether the first defendant is liable to account and if so from what date ?

(*iii*) What are the shares of the plaintiff and the second defendant ?

(*iv*) To what relief will the parties be entitled ?

Besides the evidence already on record the parties will be entitled to adduce further evidence. The suit must be disposed of expeditiously. The parties will bear their own costs in the appeal. The Court-fee paid on the memorandum of appeal will be refunded to the appellant. Costs in the trial Court will abide the result of the suit. In the meanwhile the first defendant who is said to have collected the costs from the plaintiff must pay back the costs to the plaintiff

S V.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K. S RAMAMURTI AND MR JUSTICE T. RAMAPRASADA RAO

H. T Vira Reddi .. *Appellant**

v.

Kistamma .. *Respondent*

Letter Patent (*Madras*), *Clause* 15—*Appeal under, to Division Bench of High Court from judgment of single Judge rendered in firs appeal—Jurisdiction and scope of enquiry—Findings of fact if and when can be interfered with*

Hindu Marriage Act (*XXV of* 1955), *sections* 10, 13 *and* 23—*Relief under sections* 10 *or* 13—*Nature and standard of proof required—' Access ' and ' non-access '—Meaning of—Proof.*

Per *Ramamurti, J* The jurisdiction of the Bench and the scope of an enquiry in an appeal under clause 15 of the Letters Patent (Madras), against the judgment

* L.P A No 31 of 1964 12th January, 1968.

of a single Judge of the High Court rendered in the exercise of his appellate jurisdiction (in a first appeal), will be the same as the jurisdiction of the Bench and the scope of an enquiry in an appeal from the decision of a single Judge of the High Court disposing of original suits that is to say, the Bench will have undoubted jurisdiction to examine the facts and the evidence and reach its own findings thereon But though the powers under clause 15 are thus wide and unqualified, the Bench would be reluctant and would not lightly interfere with the findings of the single Judge of the High Court

The oft-quoted note of warning that a Judge sitting in appeal not having had the opportunity of seeing and hearing the witness and observing their demeanour should think twice and more than twice before reversing the findings of fact arrived at by the trial Court which has had that opportunity, would not apply to a case where the Judge was only drawing his inference from the evidence on record and probabilities of the case Where important consideration bearing on the question of credibility have not been taken into account or properly weighed either by the trial Judge or by a Judge of the High Court on appeal and where the question of the probability of the story given by the witnesses clearly indicate that the view taken by the trial Court and the appellate Court is wrong, the Bench will have no hesitation in reversing the findings on such question The Bench is free to reach its conclusion, where it is a question of inference on facts based upon probabilities, circumstances of the case and the assessment of the oral evidence, where the trial Judge has not recorded any distinct opinion about his impression based upon his observations of the demeanour of the witnesses and the way in which evidence was given by them

Case-law discussed.

As a general rule, there cannot possibly be any dispute that in matrimonial proceedings the Court is vigilant to see that the burden of proof is satisfactorily and properly discharged by the applicant and that the respondent s putting forward a false defence is not regarded as sufficient by itself to establish the truth of the applicant's case At the same time, the putting forward of false defence will destroy the respondent's credibility This does not, however, mean that in all cases, irrespective of the precise setting and the nature of the rival theories, the Court cannot take into account its own findings that the version of the other side is totally false In numerous cases it will have a bearing upon the inference to be drawn upon the probabilities and the surrounding circumstances of the case and the assessment of the petitioner's case Again, when there are only two diametrically opposite rival versions and the case does not admit of any other theory the finding of the Court that the case of one of the parties is totally false may have some bearing and relevance on the assessment of the truth of the other version. Indeed in many cases, the case may not admit of a treatment of the two rival versions, in two separate water tight compartments

For a limited purpose, depending upon the particular facts of each case and also depending upon the nature of the competing rival theories, it will not be improper for the Court to take into consideration, the fact that the case of one party has been proved to be completely false At the same time, it has to be borne in mind that that by itself would not amount to holding that the applicant has discharged the burden.

In matrimonial cases it is better for the Judge to apply the same standard for all his findings.

Per *Ramaprasada Rao, J* As the word ' access ' and ' non-access ' are words of significance in matrimonial causes, we are bound to adopt the timorous course of construing such words of art in its correct and not in some vague and extended meaning The word ' access ' can be explained as an indicia of opportunity for marital intercourse Like any other physical fact it could be proved by direct or circumstancial evidence Direct evidence can only be secured through the spouses concerned Such evidence is admissible but should be considered with caution and with a lynx eye As corroboration of such evidence is practically

impossible and indeed not required, the surrounding circumstances, an overall picture and the conduct of the parties do act as legal accessories to weigh such uncorroborated testimony.

Even in cases where adultery or any other matrimonial offence is alleged, the offence complained of should be proved beyond reasonable doubt. Undoubtedly matrimonial proceeding is an ordinary civil proceeding But as it involves the disruption of marital tie, law imposes a stricter degree of scrutiny of the evidence if uncorroborated. Such corroboration is demanded as a rule of precaution and prudence so that a well instructed mind may be able, after bringing to bear its own observations and experience of life, to judge from the *pros* and *cons* of each particular case, whether the sole *ipsi dixit* renders possible the theory set out

Appeal under clause 15, of the Letters Patent against the Order of Jagadisan, J, dated 14th November, 1963 and made in A A O. No. 83 of 1961 preferred to the High Court against the Order of the City Civil Court, Madras, dated 3rd November, 1960 in O P. No. 63 of 1960

V. Tyagarajan and *P. Venkataswami*, for Appellant.

T. K. Rajagopalan and *S. S Rajagopalan*, for Respondent.

The following Judgments were delivered .—

Ramamurti, J—I have perused the judgment of my learned brother, with respect, I entirely agree with his reasonings and conclusions. The only justification for my writing a separate judgment is (as Lord Campbell observed in *Piers* v *Piers*,[1] the tremendous responsibility that is cast upon us while rendering this decision which will have grave and serious consequences upon the status of child We have bestowed anxious and careful thought over all the aspects of the matter and have reached the clear conclusion that applying all the standards of strict proof beyond all reasonable doubt, as insisted in all matrimonial cases, the appellant had made out a case for judicial separation under section 10 (1) (*f*) of the Hindu Marriage Act, 1955 (referred to herein as the Act) *i.e*, on the ground that the respondent had had sexual intercourse with some person other than the appellant. The prayer for a decree of divorce under section 13 (1) (*i*) of the Act on the ground that the respondent was living in adultery was not pressed before us In a proceeding under section 13, for decree of divorce, on the ground of adultery, it is necessary that the course of immoral conduct must be more or less continuous and isolated lapses and acts of immorality would not suffice On the other hand, for the relief of judicial separation under section 10 (1) (*f*), the party aggrieved will be entitled to that relief even if he proves one single act of infidelity on the part of the wife, she having had sexual intercourse with a stranger In the instant case, the attempt of the appellant has been to establish beyond all reasonable doubt that his wife severed her connections and left the appellant once for all on 17th November, 1957, after a serious quarrel, that thereafter, there had been no kind of access whatsoever between the couple and that he had not even looked at the face of the respondent, with the result, that the female child which was born to the respondent on 23rd December, 1958, 402 days after the final severance of ties and separation, was born only as a result of the respondent's sexual intercourse with somebody other than the petitioner, the appellant herein. In other words, the appellant is not relying upon any evidence either of himself or of other witnesses having actually seen the respondent having sexual intercourse with a third party He solely relies upon the single fact of the respondent giving birth to a female child after an interval of 402 days of the separation or the severence of ties as husband and wife. The only crucial question that arises is whether the respondent left Madras and the appellant once for all, on 17th November, 1957, and settled down with her parents in her native village near Bellary

As against this (omitting her case about the several episodes in her married life during her stay with the husband) the rival version of the respondent is that she became pregnant through the appellant in Ugadi, middle of March, 1958, that this

1 11 House of Lord Cases 9 Eng Rep 1118 at page 1136.

pregnancy was disclosed to R Ws 3, 4 and 5 on 30th June, 1958, when they visited the respondent and the appellant at the latter's bungalow in Poonamallee High Road, that R W 4 gave her Tirupati *Prasadam*, that the respondent's brother Thamma Reddi, (R W 6) and his wife came to Madras in August, 1958 along with presents as is customary in the case of first pregnancy, stayed with the respondent for two or three days and took her home to their native place, that the confinement took place in a Nursing Home in Bellary, that during her stay away from Madras, all the relations of the appellant *i e*, the father of the appellant, his brothers and their wives, cousin etc, took active interest as a rejoicing event, visited the respondent and gave her the usual presents and also participated in the *Namakaranam* ceremony of the child. To prove, that she was in Madras with her husband in June, 1958 (undoubtedly at a time when she had become pregnant) besides her own evidence, the respondent had adduced the evidence of R Ws. 3, 4 and 5 and her brother Thamma Reddi R W 6 The mental attitude and this conduct of the members of the family of the appellant during the period of pregnancy, at the time of the delivery in the Nursing Home at Bellary and at the time of the *Namakaranam* ceremony are also relied upon by the respondent as strong background and powerful surrounding circumstances tending to the inference that the pregnancy and the child birth was considered by all of them as an event for rejoicing and great jubilation and that the members of the family would not have assumed this cordial attitude, free from any suspicion or misgivings about the pregnancy and the child birth It is obvious, that if this case of the respondent is true, the appellant has no case.

The married life of the couple had been very unhappy, and too often, the relationship between the couple became embittered and strained on account of the frequent unhappy episodes It is unnecessary to embark upon an investigation as to who is the more guilty or blameworthy party But the overall picture which one gets is that the appellant has been a victim, subjected to any amount of harassment and humiliation from his obstinate unyielding wife who wrecked the married life and made life impossible, for the appellant The answers elicited in the course of the cross-examination of the respondent and her witnesses give the picture that she is a willing tool in the hands of interested, designing, powerful persons behind the screen who were bent upon ruining the career of the appellant Surely, this is not a case of the respondent being an ill-treated or discarded wife. Even so, I propose to examine the truth of the rival versions unaffected by and without any reference to the relative blame or guilt of the respondent As my learned brother has elaborately dealt with the facts of the case, there is no need for me to reiterate the same and I shall straightway address myself to the crucial question whether the respondent was in Madras in June, 1958.

[After adverting to the evidence in the case his Lordship proceeded :]

Before I examine the evidence on this aspect, it will be convenient to refer to the law as to the precise limit of jurisdiction of this Court and the scope of an enquiry in an appeal under clause 15 of the Letters Patent against the judgment of a single Judge of this Court. The appeal C M A No. 83 of 1961 against the Judgment of the learned City Civil Judge was preferred to this Court under section 28 of the Act of 1955. The Act does not contain any prohibition or restriction as to a further appeal like section 39 (2) of the Arbitration Act, covered by the decision of the Supreme Court in *Union of India* v *Mohindra Supply Co.*[1], with the result, that the appellant has got a further right of appeal to this Court under clause 15 of the Letters Patent The question is whether in such a Letters Patent Appeal, the Bench is entitled to consider questions and findings of facts and reach its own conclusion, whether affirming or differing from the findings of the learned Single Judge or whether the Bench is bound by the findings of fact reached by the learned Single Judge. Clause 15 of the Letters Patent provides (in so far as it is material) —

1 (1962) 2 S C J 179 (1962) 2 M L J (S C) 63 (1962) 2 An W R (S C) 63 (1962) 3 S C R 497 . A I R 1962 S C 256

"And we do further ordain that an appeal shall lie to the said High Court of Judicature from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court) of one Judge of the said High Court and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court . in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal."

Adverting to the unqualified nature of the right of appeal under a similar provision (Clause 10 of the Letters Patent of the Lahore High Court), the Supreme Court in *Ladli Prasad* v *Karnal Distillery*[1] observed thus,—

"Manifestly the clause confers an unqualified right of appeal to the High Court from the judgment of a single Judge exercising original civil jurisdiction Similarly, there is a right of appeal from a judgment of a single Judge hearing a civil appeal where the judgment is not in an appeal from an appellate decree But against the judgment of a Single Judge exercising powers in an appeal from an appellate decree, an appeal under the Letters Patent only lies if the Judge declared that the case is fit one for appeal and not otherwise There is no warrant for making a distinction between an appeal filed against the judgment of a Single Judge exercising original jurisdiction and a judgment in exercise of appellate jurisdiction "

This is a clear pronouncement to the effect that the jurisdiction of the Bench and the scope of an enquiry in an appeal against the judgment of a learned Single Judge rendered in the exercise of this appellate jurisdiction (in a first appeal) will be the same as the jurisdiction of the Bench and the scope of an enquiry in an appeal from the decision of a learned Single Judge of this Court disposing of original suits, that is to say, the Bench will have undoubted jurisdiction to examine the facts and the evidence and reach its own findings thereon.

This identical aspect has also been considered in decisions of other High Courts In *Venkataramayya* v *Kesavanarayana*[2], a Single Judge of the High Court in a first appeal reversed the decision of the Trial Judge In the Letters Patent Appeal before the Bench, the objection was raised that the Letters Patent Appeal was virtually in the nature of a second appeal and the Bench was governed by the limitations contained in section 100, Civil Procedure Code Umamaheswaram, J , delivering the judgment on behalf of the Bench overruled this objection holding that there was no rule of law that a finding of fact arrived at by a Single Judge of the High Court in a first appeal is not open to challenge under clause 15 of the Letters Patent and that the Letters Patent Appeal is in the nature of rehearing of the appeal, clause 15 being differently worded from section 100, Civil Procedure Code The inhibition in section 100, Civil Procedure Code, cannot be imported into an appeal under clause 15 of the Letters Patent. An earlier decision of the Patna High Court in *Ramaswarup Singh* v. *Muneshwar Singh*[3], took the view that section 100, Civil Procedure Code, would apply to a Bench hearing a Letters Patent Appeal under the corresponding clause, clause 10 of the Letters Patent (Patna) But later decisions have taken a different view on the same lines as the Andhra Pradesh High Court In *Jugal Kishore* v *Union of India*[4], it was pointed out by the Bench that when the very same clause in the Letters Patent provides for an appeal from the decision of a Single Judge exercising original jurisdiction as well as exercising appellate jurisdiction it was impossible to imagine that in one case the Bench will have jurisdiction to interfere on facts, but in the other, the Bench having no jurisdiction to interfere on facts, the sole scope of the hearing in appeal being confined to mere questions of law. It was also

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1 (1962) 2 S C J 12 (1964) 1 S C R 270 447
A I R 1963 S C 1279
2 (1963) 1 An W R 251 A I R 1963 A P
3 A I R 1964 Pat 76
4 A I R 1965 Pat 196.

observed that it is a well established principle of law that unless the satute otherwise provides, an appellate Court shall have the same powers and jurisdiction of dealing with the questions, either of fact or of law, arising in the appeal before it, as that of the Court whose judgment is the subject-matter of scrutiny in the appeal It was further emphasised therein that it is only because of the special provision contained in section 100, Civil Procedure Code, that in second appeals, there are well defined restrictions and prohibitions with regard to the investigation of facts The observations to the contrary of Mahapatra, J, in the earlier decision of the Patna High Court in *Ramaswarup Singh* v *Munishwar Singh*[1], were distinguished as in the nature of *obiter dicta*

We may also refer to another Bench decision of the Patna High Court in *Saligram* v *Ayodya Prasad*[2], in which it was held that the Bench in dealing with a Letters Patent Appeal has all the powers which could have been exercised by the Single Judge In view of the plain, unqualified language of clause 15 and the clear pronouncement of the Supreme Court, it is unnecessary to elaborate the point further.

In a Letters Patent Appeal preferred, where leave has been granted by a Single Judge, while disposing of a second appeal, the position will be different, for the obvious reason, that the Bench hearing the appeal will be bound by the same statutory limitations as the Single Judge in a second appeal under section 100, Civil Procedure Code In a Letters Patent Appeal, the Bench is concerned with the correctness or otherwise, of the conclusion of the learned Single Judge and if the latter was bound by certain limitations, the Bench would be equally bound by the same For instance, in *Subbarama* v. *Saraswati*[3], when a Single Judge disposing of a second appeal arising under the Hindu Marriage Act of 1955 interfered with questions of fact in violation of section 100, Civil Procedure Code, the Bench reversed that finding In *Juvubai* v *Ningappa*[4], again in a second appeal, arising out of proceedings under the Hindu Marriage Act, it was held that the High Court cannot interfere with questions of fact in view of the provisions of section 100, Civil Procedure Code These are all cases in which the first proceeding in the High Court itself was governed by section 100, Civil Procedure Code. The appeal before Jagadisan, J., was not under section 100, Civil Procedure Code, but was a first appeal

Though our jurisdiction and powers under clause 15 are wide and unqualified the Bench is reluctant and does not lightly interfere with the findings of the learned Single Judge of this Court It is, for this reason, that barring appeals from the decisions in the original suits, other appeals under clause 15 of the Letters Patent, like writ appeals or appeals from orders of remand or decisions rendered by a Single Judge in the exercise of his appellate jurisdiction, (not being second appellate jurisdiction), are posted for admission for an initial scrutiny by the Bench The appellant has to make out a clear case for interference under clause 15. The oft-quoted note of warning that a Judge sitting in appeal not having had the opportunity of seeing and hearing the witnesses and observing their demeanour should think twice and more than twice before reversing the finding of fact arrived at by the trial Court which has had that opportunity, does not apply in the instant case as the learned Single Judge was only drawing his inferences from the evidence on record and the probabilities of the case Where important considerations bearing on the question of credibility have not been taken into account or properly weighed either by the Trial Judge or by a Judge of this Court on appeal and where the question of the probability of the story given by the witnesses clearly indicate that the view taken by the trial Court and the appellate Court is wrong, this Court will have no hesitation in reversing the findings on such questions. We are free to reach our own conclusion, where it is a question of inference on facts, based upon probabilities, circumstances of the case and the assessment of the oral evidence, where the trial Judge has not recorded any distinct opinion about his impression based upon his observations of

1 A I R 1964 Pat 76
2 A I R 1966 Pat 61
3 (1966) 2 M L J 263 I L R. (1968) 1 Mad 205 A I R 1967 Mad 85
4 A I R 1963 Mys 3

the demeanour of the witnesses and the way in which evidence was given by them. It may be useful to extract the following observations of the Supreme Court in *Radha Prasad* v. *Gajadhar Singh*[1], where the Supreme Court *has specifically dealt with the power of the appellate Court in the matter of appreciation of evidence and* interference with a finding of fact

" This question of the proper approach of the Court of Appeal to decisions on questions of fact arrived at by the trial Court was considered by this Court in *Sarju Prasad* v. *Jwaleshwari Pratap Narain Singh*[2]. Mukherjee, J, while delivering the judgment of the Court observed —

'In such cases the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge The rule is and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact' The position of law, *in our opinion, is that when an appeal lies on facts it is the right and the duty of the appeal Court to consider what its decision on the question of facts should be,* but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the trial judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demean our of the witness in Court But, *this does not mean that merely because an appeal Court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of the matters on record* When it appears to the appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the appeal Court should have no hesitation in reversing the findings of the trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witneses observed in Court *but a question of inference of one fact from proved primary facts the Court of appeal is in as good a position as the trial Judge and is free to reverse the findings if it thinks that the inference made by the trial Judge is not justified* "

(After analysing the evidence and holding that the respondent's version of the case could not be accepted his Lordship proceeded)

Learned Counsel for the respondent, Mr T K Rajagopalan, invited our attention to some of the decisions and contended that the party who seeks relief, whether under section 10 or under section 13 of the Act must adduce strict, satisfactory proof, that the standard of proof should be as high and rigorous as in a criminal case and that the relief should not be granted on the mere balance of probabilities or on the basis of the benefit of doubt. As part of this argument, learned Counsel also urged that the fact that the respondent had failed to establish her case as pleaded by her and that the evidence adduced by her, oral or documentary, has been found to be false and did not support her, would not in any manner help the appellant in the matter of discharging the heavy burden cast upon him to establish his case by clear positive, satisfactory evidence While we agree with a major portion of this submission, we are of the view that there is no warrant in law for this extreme con-

1 (1960) S C J 73 (1960) 1 S C R 663 (1960) 1 An W R (S C) 33 (1960) 1 M L J S.C 33 A I R 1960 S C 115 at 118

2 (1950) S C J 583 (1950) S C R 781 at p 784 A I R 1951 S C at p 121

tention It is sufficient to refer to the decision of the Supreme Court in *E J White* v. *Mrs K O White*[1], as to the perspective of approach while deciding disputes in matrimonial causes The Supreme Court has observed that Courts in India while deciding matrimonial causes,

> " shall act and give relief on principles and rules which in the opinion of the Court are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief "

From this decision, it is clear that while awarding relief under section 23 of the Act, the Court must be satisfied beyond all reasonable doubt and that what is required is that there should be a strict enquiry into the matter The word ' strict ' is sufficiently apt to describe the measure and high standard of proof. While pointing out that the two jurisdictions, matrimonial and criminal, are district jurisdictions, the Supreme Court has extracted with approval, the statement of the law by Lord MacDermott in *Prestone Jones* v *Prestone Jones*[2], to the effect that the expression ' satisfied ' in the statute means, ' satisfaction by proof beyond reasonable doubt ' and that the standard of proof drawn from the criminal law is not a safe or proper analogy.

As regards the precise import of the standard of proof beyond reasonable doubt, it may be useful to refer to the following observations of Denning L J. in *Miller* v *Minister of Pensions*[3].

> " It need not reach certainty, but it must carry a high degree of probability Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, ' of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice "

This rule has been applied and followed in a recent Bench decision of this Court in *Subbarama* v *Saraswathi*[4], approving the statement of the law by Venkatadri, J., in *Varadarajulu Naidu* v *Baby Ammal*[5] In *Bipinchandra Shah* v. *Prabhavati*[6], the husband sought divorce against the wife on the ground that she had deserted the husband for more than four years prior to the commencement of the proceeding. The question was whether during the entire period of four years, the wife stayed away with the definite continued, unbroken animus of not coming back to the husband or whether she had subsequently changed her mental attitude during that period and was anxious to join the husband The wife's case that she did not leave or desert her husband voluntarily and of her own free will but the husband actually drove her out of the house was not accepted Even so, on the facts, the Supreme Court found that after the wife left the husband of her own accord during the interval of 4 years the wife did not stick on to her decision but changed her mind and was prepared to join the husband The Supreme Court observed at page 188 that

> " the fact that the wife pleaded a case of constructive desertion by the husband and failed to establish that case would not necessarily lead to the conclusion that the husband had succeeded in proving his case "

Learned Counsel for the respondent relied upon those observations It is needless to say that those observations should be understood in the light of the particular facts of that case As a general rule, there cannot possibly be any dispute that in matrimonial proceedings the Court is vigilant to see that the burden of proof is satisfactorily and properly discharged by the applicant and that the respondent's putting forward a false defence is not regarded as sufficient by itself to establish the

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1 (1958) S C J 839 at 843 (1958) S C R. 1410 2 An W R (S C) 125 (1958) 2 M L J (S C) 125 . (1958) M L J (Crl) 631 A I R 1958 S C 441

2 L R (1951) A C 391 at 417

3 (1947) 2 All E R 372

4 (1966) 2 M L J 263 I L R (1968) 1 Mad 205 A I R 1967 Mad 85

5 I L R (1964) 2 Mad 574 (1964) 2 M L J. 187

6 (1957) S C J 144 (1956) S C R 838: A I R 1957 S C 176

truth of the applicant's case At the same time, the putting forward of false defence will destroy the respondent's credibility This does not, however, mean that in all cases, irrespective of the precise setting and the nature of the rival theories, the Court cannot take into account its own findings that the version of the other side is totally false In numerous cases it will have a bearing upon the inference to be drawn upon the probabilities and the surrounding circumstances of the case and the assessment of the petitioner's case Again, when there are only two diametrically opposite rival versions and the case does not admit of any other theory the finding of the Court that the case of one of the parties is totally false may have some bearing and relevance on the assessment of the truth of the other version. Indeed in many cases, the case may not admit of a treatment of the two rival versions, in two separate water tight compartments For instance, in this case if the case of the respondent that she left only in August, 1958 is found against, there is no other case that she left on some date other than November, 1957 and *i e*, between November, 1957 and August, 1958 In this connection, it may be relevant to refer to a significant observation in the decision in *E J White* v. *Mrs. K O White*[1], already referred to. In that case the husband asked for the dissolution of his marriage on the ground that the wife had committed adultery by staying for several days in the Central Hotel, Patna, along with one Mr David The wife, in contesting the petition, denied the whole episode of her stay in the Central Hotel along with Mr. David. The Supreme Court found that her defence was totally false, but that she stayed in the hotel and in the light thereof, assessed the evidence adduced by the husband and found the wife guilty of adultery This is what the Supreme Court observed at page 443.

> " The wife in the witness box wholly denied the episode of the Central Hotel including her stay there, which has deprived the Courts of her explanation. We are, therefore, unable to get any assistance from her or as a matter of that from respondent 2 as to what happened in the hotel at Patna "

In the instant case, the wife respondent came forward with a false case about the circumstances under which she left the husband and the other events following thereafter. By this dubious conduct, she had deprived the Courts of her true explanation Even in criminal cases, it is permissible for the prosecution to rely upon the fact that the explanation given by the accused in his statement under section 342, Criminal Procedure Code, is patently false and opposed to the established facts and circumstances of the case I am of the view that for a limited purpose, depending upon the particular facts of each case and also depending upon the nature of the competing rival theories, it will not be improper for the Court to take into consideration, the fact that the case of one party has been proved to be completely false At the same time, it has to be borne in mind that that by itself would not amount to holding that the appellant has discharged the burden There is no need to refer to the other cases relied upon by learned Counsel for the respondent because we are resting our conclusion not upon mere balance of probabilities or on the theory of benefit of doubt or even on the ground that the respondent's defence is false. We are satisfied that taking the evidence adduced on the side of the appellant, along with the probabilities and surrounding circumstances of the case, the appellant has proved beyond all reasonable doubt that the separation of the couple was in November, 1957.

[After analysing the rest of the evidence His Lordship said :]

It only now remains to consider the two circumstances strongly used against the appellant by Jagadisan, J , as powerful conduct evidence. The first is the failure to send an immediate reply to the telegram, Exhibit A-1, containing the news of the birth of the child. The learned Judge himself in the later portion has stated that having regard to the circumstances of the case, the prestige of the family, the conduct of the appellant was a fair and reasonable attitude and anybody in his position would have done the same thing. I may, in this connection, refer to the observa-

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1 (1958) S C J 839 (1958) S C R 1410 (S.C) 125 (1958) M.L.J. (Crl) 631 · A.I.R. (1958) 2 An W R (S C) 125 · (1958) 2 M L J 1958 S C 441.

tion of Lord Denning in *Joyce* v *Joyce*[1], that in matrimonial cases, it is better for the Judge to apply the same standard in all his findings In that case, the trial Judge used some set of circumstances in two contexts mutually inconsistent and this is how Lord Denning put the matter —

> " He very rightly acquitted the wife and the party cited of the charge of adultery saying that he was 'not sure' that there was adultery between them But then he seems to have taken the suspicious circumstances into account in considering whether to exercise discretion in her favour He said . 'I am left with a feeling of grave suspicion as to whether the party cited has committed adultery with the petitioner and she with him If I had to decide this case on a balance of probabilities, I would make a finding of adultery "
>
> So his findings depended on the difference in the standard of proof On the one hand, in considering whether the charge was proved against her, he had to be 'sure', that is, be satisfied beyond a reasonable doubt, and he acquitted her On the other hand, in considering discretion, he could look at it on a balance of probabilities and in effect find her guilty. It reminds me of *Hornal* v *Neuberger Products Ltd* [2], where different findings were made by a Judge according to the standard of proof he applied I think that such a difference is very undesirable It is better for the Judge to apply the same standard in all his findings He should ask himself 'Am I satisfied that adultery has taken place ?' If, yes, he should find her guilty If no, acquit her, and having acquitted her, he should not take it against her when exercising discretion."

I am also of the view that the appellant was well advised in keeping quiet at that moment and it is not right nor fair to expect him to send an immediate protest while his wife had not even been discharged from the Nursing Home It must be borne in mind that the appellant's father and the respondent's mother are very near relatives, brothers and sisters Is it right to expect of the appellant to send an immediate reply to Exhibit A-1, even while the respondent was in the Nursing Home, charging her with adultery, proclaiming the child as a bastard and threatening the wife with Court proceedings ? To expect any such conduct on the part of the husband would mean to expect him to behave not like a human being, but a beast devoid of all culture.

[The second circumstance adverted to above has been deleted as unnecessary]

The result is that the judgment of the learned City Civil Judge and Jagadisan, J, are set aside The question of appropriate relief which would meet the end of justice on the peculiar facts and circumstances of the case poses a problem This case is a typical instance of best illustration of the proverbial saying "Justice delayed is justice denied " When the appeal came before the first Bench, my Lord, the Chief Justice and Natesan, J, attempted to compose the differences between the parties But as the compromise proposals did not take any shape, the Bench directed the posting of the appeal before us Even at the commencement of the hearing, Counsel on both sides stated that there is no question of any settlement The final rupture and separation between the parties took place more than ten years back and the appellant is made to suffer for the inevitable delay of Court proceedings and this Court taking the final decision in his favour, setting aside the erroneous views held up till now. The maxim *actus curieae neminem gravabit*—" An act of the Court shall prejudice no man ", has been applied in varying contexts so that no party suffers any prejudice through the instrumentality of the Court and the Court proceedings. Precedents are not wanting in which by the application of this salutary principle of justice underlying this maxim, judgments have been entered retrospectively to meet the justice of the case, the decision taking effect for a period long anterior to the date of the judgment—Vide Broom's Legal Maxims, 10th Edn. page 73, 1939 Edn. If the award of the relief of judicial separation has not been delayed, the appellant would have been entitled to the relief of divorce under section 13, sub-section (1-*A*)

1 (1966) 2 W R 660 1034.(1956) 3 All E.R 970.
2 L R. (1957) 1 Q B 247 · (1956) 3 W.L R

sub-clause (i) read with section 23, there having been no reunion between the parties for the past over ten years. The question whether in this proceeding itself, there can be a decree for judicial separation dating back to the date of the petition and a decree for divorce under section 13, sub-section (1-*A*), sub-clause (1) was debated in the course of the hearing and whether in view of the language in section 13, the Court will have jurisdiction to award the relief of divorce relying upon the fundamental legal maxim referred to above In view of the fact that our decision may not be the final say in the matter, we took the view that it would only complicate matters if we were to award the relief of divorce under section 13 It is unfortunate and a matter for regret that besides sufferings of every kind in his married life, the appellant has to wait for another two years before there can be a final legal severance of his marital ties In this view, we are not expressing any final opinion as to the jurisdiction of the Court to mould the relief in matrimonial causes by the combined operation of section 10 and section 13 read with section 23 of the Act.

The appeal is accordingly allowed. I agree with my learned brother about the order as to costs

Ramaprasada Rao, J—The appellant (husband) is seeking judicial separation from the respondent (wife) who is his father's sister's daughter The marital life of the spouses was not rosy and was always impregnated with unhealthy and unhappy pin pricks The appellant married the respondent according to the Hindu rites in 1943 at Maradagiri in former Bellary district in the composite State of Madras The appellant was a student then Excepting for one month, July, 1948, the respondent is stated to have been residing with her parents till 1948 This was so even when the appellant left for the United Kingdom for higher studies. On his return in 1953, the respondent joined him ; but even then her consortium with him was for a short while She left again for her parents' house and joined him at the intervention of elders after the appellant shifted to No. 439, Poonamalle High Road, a prominent highway in the City The appellant's version is that he was bearing with all the idiosyncrasies of his wife with assiduous patience and in fact was anxious to have a child. The respondent was subject to an operation for conception in or about the year 1956. The wife however was not responsive, and, according to the appellant, she was indifferent and was averse to share the common bed, thus making the life of the appellant most unhappy The respondent, however, denies that she ever kept herself aloof from the consortium of her husband, and, in fact, she could not win over the affections of her husband because she was not good looking and uneducated Her complaint is that she was being constantly nagged by her husband because of her backward social qualities We are not however concerned in this case with facts attendant and relating to physical or mental cruelty The primordial fact, which is the primary setting on which the bedrock of the petition under the Hindu Marriage Act, 1955 filed by the appellant rests, and as is now contended, is that the respondent is guilty of sexual intercourse with a third party, other than himself, within the meaning of section 10 (1) (*f*) of the Act, and hence the appellant is entitled to judicial separation on that ground It may be noted that though originally the petition was founded on the ground of adultery and a divorce was sought, the appellant pressed his claim at the appellate stage though not at the trial stage, for judicial separation. That the petitioner can ask for the lesser relief of judicial separation, though in the first instance divorce was sought, is indisputable and rightly therefore the learned Counsel for the respondent did not demur to the course adopted by the appellant both before Jagadisan, J, who heard the appeal and before us.

The primary facts on which this petition is sought to be sustained, after foundering the charge of adultery, may be noted As already stated, the spouses, though under the same roof, were not living happily Complaints and cross complaints were the order of their living. According to the appellant, the rendition of conjugal rights by the respondent was an anathema to her, in spite of his honest overtures to consummate the marriage. Such domestic bickerings took an abnormal turn, that according to the appellant, she would not talk to him freely, she would cook

for herself in the bedroom, she would not permit him to sleep with her on some pretext or other, and her hostility and aversion towards him reached the zenith in 1957. The respondent however denies such a state of affairs and would have it that it was the appellant who was avoiding her and was taking a delight in freely mixing up with other ladies of questionable character. On 17th November, 1957, the respondent is reported to have left the abode of the appellant after spitting and cursing the appellant. In such a huff she left along with her brother and sister-in-law that she went in a taxi, though her husband was possessed of a car and was quite opulent at that time. The respondent no doubt admits of the parting, but would say that she ceremoniously left him with her brother quick with child in August, 1958 and everything was normal till then It is not in dispute that the respondent gave birth to a child on 23rd December, 1958 It is also common ground that the appellant had no access to the respondent after she left her husband's abode The crucial question is, when she left No 439, Poonamallee High Road, Madras, her husband's residence. If, according to the appellant, she left on 17th November, 1957, then the child born on 23rd December, 1958, cannot be the appellants' and that circumstance by itself would satisfy the ingredients of section 10 (1) (*f*) of the Act. If, on the other hand, the respondent left in August, 1958, as spoken to by her, the appellant should fail.

If the version of the respondent that she left in August, 1958 is accepted, then the issue whether the appellant did have access to the respondent during the crucial period necessarily looms large. As the words " access " and " non-access " are words of significance in matrimonial causes, we are bound to adopt the timorous course of construing such words of art in its correct and not in some vague and extended meaning. The word " access " can be explained as an indicia of opportunity for marital intercourse. Like any other physical fact it could be proved by direct or circumstancial evidence Direct evidence can only be secured through the spouses concerned. There was once a controversy in India—whether in bastardy proceedings, evidence of either spouse is admissible. In fact, a moot question was raised, whether the rule in *Russell v. Russell*[1], precluding such admission of the evidence of the husband is adaptible to Indian conditions. The final authoritative pronouncement is now rendered by the Supreme Court in *Venkateswarlu* v. *Venkatanarayana*[2], wherein their Lordships say that there is nothing in the Evidence Act to prevent the spouses giving evidence of non-access.

In this case, the appellant who is a man of status and a wellknown doctor, was anxious to have a child He had an operation done to his wife in 1956. As stated already, the married life was quite normal But the appellant's anxiety to have children, after 14 years of marriage, can easily be visualised. The respondent was rigid and inelastic. She grew more turbulent and in 1957 there was a complete breakdown He would say that after 1956 " the quarrels increased and we lived separately in the same house not having access to each other " The explosive conduct of the respondent when she left her husband's roof in a taxi after having cursed and spat at the house is a strong circumstance to reflect the mind of the respondent and in what circumstances she left. This incident throws considerable cloud on the propriety of the behaviour of the respondent in relation to her matrimonial home It is no doubt imperative for the Courts to foster and protect the marital tie as it is a matter concerning society at large and is of grave public importance. *A fortiori* it is so, when a matter arises whether the husband should be deemed to have access to the wife at the crucial time such that the resultant child may be legitimised instead of bastardised. In this case non-access to the wife before she left is spoken to by the husband Such evidence is admissible, but should be considered with caution, and as pointed out by Panchapakesa Ayyar, J , in *Dr. Dworaka Bai* v. *Prof Nainan*[3], with a lynx eye. As corroboration of such evidence is practically impossible and indeed not required, the surrounding circumstances, an overal picture and the conduct of the parties do act as legal accessories to weigh such

1 L R (1924) A C 687
2. (1954) S C J 84 · (1954) S.C.R. 424 · 1954 1 M L J 152 (S C)
3 A I.R (1953) Mad. 792

uncorroborated testimony. Even in cases where adultery or any other matrimonial offence is alleged, the offence complained of should be proved beyond reasonable doubt. Undoubtedly, matrimonial proceeding is an ordinary civil proceeding. But as it involves the disruption of marital tie, law imposes a stricter degree of scrutiny of the evidence, if uncorroborated Such corroboration is demanded as a rule of precaution and prudence so that a well instructed mind may be able, after bringing to bear its own observations and experiences of life, to judge from the *pros* and *cons* of each particular case, whether the sole *ipsi dixit* renders possible the theory set out The words of Sinha, J, in *Bipinchandra Shah* v. *Probhavati*[1], may be usefully quoted.

> " .... .. though corroboration is not required as an absolute rule of law the Courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the Court In this connection the following observations of Lord Goddard, C J, in the case of *Lawson* v. *Lawson*[2], may be referred to —' These cases are not cases in which corroboration is required as matter of law. It is required as matter of precaution "

In the ultimate analysis, the evidence of the husband and other evidence and circumstances ought to be clinching and cogent to exclude the possibility of innocence of the person against whom the matrimonial offence is alleged

[After examining the evidence His Lordship said :].

From the above discussion we are constrained to take the view that even before she left her husband's abode, the appellant did not have ' access ' to her or opportunity for sexual intercourse during the year 1957.

[On the question as to when the respondent left her husband His Lordship after discussing the evidence said]

We have no hesitation to hold that the respondent left in November, 1958 and not in August, 1958.

We have now to consider whether the matrimonial offence within the meaning of section 10 (1) (*f*) can be said to have been committed by the respondent, beyond reasonable doubt

[After discussing the evidence on this aspect His Lordship proceeded .]

As pointed out by a Full Bench of this Court in *John Howe* v. *Charlotte Howe*[3].

> " a child born eleven months after the cessation of marital intercourse was illegitimate and that the petitioner was entitled to a divorce ".

We need not go so far, as the overwhelming probabilities in this case assuredly point out that a marital offence within the meaning of section 10 (1) (*f*) has certainly been committed and it has been brought home to the respondent beyond reasonable doubt. Mere strictures on the appellant for not having expressly mentioned about the curious circumstances of the birth of a child after the respondent left him in November, 1957 would tantamount to mincing matters It is an accepted canon of law as stated by Brown L J in *Gropoor* v. *Smith*[4], " Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy " Following the salient principle we find that the respondent, after the solemnisation of the marriage, had sexual intercourse with a person other than her spouse. Whilst rendering our finding as such, we have borne in mind that the question of legitimacy is of importance to the State and to the child and that this universal adage has to be applied in a matrimonial action.

Learned Counsel for the respondent however relied upon *Subbarama Reddiar* v. *Saraswathi Ammal*[5], to state that this Court whilst exercising jurisdiction under the Letters Patent ought not to interfere with the findings of fact rendered by the learned Appellate Judge. *Subbrama Reddiar* v. *Saraswati Ammal*[5], was a case in which

1 (1957) S C J 144 : (1956) S C R 838 : A I R 1957 S C 176 to 184

2 (1955) 1 W L R 200 : (1955) 1 All E R. 341 at p 342

3 (1915) 25 M L J 594 I L R 38 Mad. 466.

4 26 Ch D 700

5 (1966) 2 M L J 263 I L R (1968) Mad. 205 : A I R 1967 Mad 85

Venkatadri, J , virtually heard a second appeal in a matrimonial action In those circumstances Anantanarayanan, O C J , (as he then was) and Ramakrishnan, J. were of the view that the findings of the lower Court are binding in second appeal and Venkatadri, J , had no jurisdiction to re-assess the evidence and come to any other conclusion even if the learned Judge thinks that the evidence ought to be appreciated differently or that some part of the testimony ought not to be believed. We may however advert to a decision of the Division Bench of this Court in *Md. Maracair* v *Veyanna Thevar*[1], and to the dicta of the Supreme Court in *Earnist John White* v. *M/s Katheleen Olive White*[2]. Rajammannar, C J , and Rajagopala Ayyangar, J., in *Md. Maracair* v. *Veyanna Thevar*[1], observed —

" Ordinarily, we are never inclined to interfere in cases where one learned Judge has exercised a discretion, but in the circumstances of this case, we are convinced that the learned Judge wrongly refused to exercise the discretion in favour of the appellant, and we are not satisfied that the ground on which the learned Judge refused to exercise this discretion in his favour is well-founded "

More apposite is the following observation of Kapur, J , speaking for the Supreme Court in *Earnist John White* v. *M/s Kathelean Olive White*[2] :

" The Supreme Court will not ordinarily interfere with the findings of fact given by the trial judge and the appeal Court ; but if in giving the findings the Courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and if the Supreme Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by the Court will be called for ".

While respectfully adopting the observations of the Supreme Court as above, we may point out that that was a case in which the Supreme Court interfered in a matrimonial case. We have already amply justified our stand in coming to a conclusion different from Jagadisan, J The learned Appellate Judge was not exercising jurisdiction in second appeal either In certain important particulars, the evidence has been misread and misconstrued. We are therefore of the view that the findings of fact of the lower appellate Judge in the peculiar circumstances of this case can be re-assessed by us in the manner we did as above. Having regard to the normal course of events and human conduct, we find that the appellant has proved his case that the respondent is guilty of an offence within the meaning of section 10 (1) (*f*), and whilst therefore allowing the appeal, grant the appellant a decree for judicial separation This appeal is therefore allowed, but in the peculiar circumstances of this case, there will be no order as to costs

V K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T. RAMAPRASADA RAO.

Annavi Moopan and another . *Petitioners**

v.

Munia Moopan . *Respondent.*

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), *sections* 4 *and* 15—*Scope—Tenant raising sugarcane crop on the leasehold lands without the permission of the landlord—Act, not contemplating fixation of fair rent for sugar cane crop—Landlord, if could claim fair rent—Order* 7, *Rule* 7, *Civil Procedure Code*

The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956, whilst providing for the fixation of fair rent in the case of wet land where the normal produce is paddy, it avoids to advert itself to cases where the main crop is sugarcane, plantain or betel vines, etc. In the instant case, it is not in dispute that

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1 (1954) 1 M L J 527 I L R (1954) Mad 1116 : A I R 1954 Mad 894

2 (1958) 2 M L J 125 (S C) : (1958) S C J 839 : (1957) S C R 1410 (1958) 2 An W R. (S C) 125 (1958) M L J (Crl) 631

*C R.P. No. 722 of 1966 19th April, 1968.

the tenant is raising, as his main crop, sugarcane If sugarcane is the main crop raised by the tenant, nothing in Act XXIV of 1956 shall apply to such a land, during the period when such land, is used for such a crop (section 15). That being so, the question arises whether Exhibit B-2, even if it could be considered as the fair rent fixed under Act XXIV of 1956 and within the meaning of section 4 of that Act, can at all have any effect on the claim projected, as at present, by the landlords, for an increased rent, on the basis that the tenant is raising sugarcane and not the ordinary wet crop of paddy

In a case where the tenancy does not expressly connote the rent payable by the tenant to the landlord, then the Courts have jurisdiction, as in the United Kingdom a jury has, to fix what is known as reasonable market rent for the property and avoid unjust enrichment to the tenant.

Under Order 7, Rule 7, Civil Procedure Code, the Court is entitled to grant such relief as it thinks just and as it is necessary in the circumstances of a case.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Karur, dated 27th August, 1965 and passed in S.C.S. No. 11 of 1965.

K. Sarvabhauman and *T. R. Mani*, for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT —Though this Civil Revision Petition arises under section 25 of the Provincial Small Cause Courts Act, it raises a very interesting and important question of law. It is very unfortunate that the defendant is not represented before me.

The plaintiffs as landlords filed a suit for recovery of a sum of Rs. 312-50, said to be due by the defendant towards rent, which, according to them, was payable by the defendant, in respect of the occupation of their lands It is common ground that the defendant is the tenant of the petitioners. The petitioners purchased the property on 9th June, 1963 The respondent-defendant was in occupation of the suit lands, long prior to the purchase by the plaintiffs, and he was also a tenant under the predecessor-in-interest of the plaintiffs. It is also common ground that, under Exhibit B-2, fair rent was fixed for this tenement in the occupation of the defendant, in or about December, 1956 The case of the plaintiffs is that after 1963 the defendant began to raise sugarcane crop on the leasehold lands without their permission and concurrently did not oblige himself either under a contract or by any arrangement to pay increased rent, for using the lands for purposes of raising sugarcane crop. For the year Sobakrithu, the defendant cultivated sugarcane crop but paid only a sum of Rs. 487-50, which was the fair rent fixed in Exhibit B-2. When the landlords protested and demanded ' a fair rent,' which, according to them was at Rs 5 per cent., the defendant refused to comply with the demand, and, therefore, the plaintiffs had to file the suit to recover the sum of Rs. 312-50, being the balance payable by the defendant based on their estimate of rent. No doubt the plaintiffs have characterised this amount as rent. The defendant took up the position that the plaintiffs are not entitled to anything more than the agreed rent, and as such agreed rent has already been paid, no further amount is payable. The learned District Munsif who went into the question found that the plaintiffs were not entitled to claim anything more than the fair rent. He was of the view that, in the absence of any fresh agreement between the parties, no claim for increased rent or money equivalent for such unauthorised use and occupation could be claimed by the plaintiffs, when Exhibit B-2 was in force. He found that the rent fixed in Exhibit B-2 was for cultivation of any crops, and thus he dismissed the suit of the plaintiffs The present revision petition is against the said decree and judgment of the learned District Munsif.

' Rent ', no doubt, is not defined both in the Madras Cultivating Tenants Protection Act, 1955 and in the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956. But the latter enactment evolved a procedure to reckon what is

known as fair rent under the Act. This is what is provided for in section 4 of the Act. There is, however, no definition of rent even in this Act Section 6 of the Act provides that, where in respect of any land fair rent has been determined under the Act, it shall continue in force for five years. One other important provision which has a bearing on the discussion to ensue is section 15, which reads as follows :

> " Nothing in this Act shall apply to any land during the period when such land is used for raising as main crop, sugarcane, plantain or betel vines or any crop which does not give any yield for a continuous period of two years or more from the time of cultivation or to any contract merely for collection or harvesting of produce of any kind "

The main contention of Mr. T R. Mani, learned Counsel for the landlords, is that the lower Court failed to see that, in the circumstances of this case, the plaintiffs are not helpless to call upon the Court, as a civil Court, to exercise its jurisdiction to fix the fair rent as popularly understood, notwithstanding the fact there is no subsisting contract as is statutorily understood He would rely upon several passages in Halsbury's Laws of England, Woodfall on Landlord and Tenant, Hill and Redman's Law of Landlord and Tenant and Anson's Law of Contract. It is necessary to consider the passages cited by him, to find whether the civil Court, placed in the circumstances as it is, has jurisdiction to fix what can be termed as reasonable compensation that has to be paid by the tenant who is admittedly in occupation of the landlord's property, in the absence of a contract to that effect between the parties Halsbury (Vol. 23) at page 559 (paragraph 1229) says:

> " Provided there is no lease under seal the landlord may also bring an action for use and occupation to recover a reasonable satisfaction for the lands held or occupied by the tenant. This remedy is available where a person has been in occupation of land without an agreement fixing the amount of rent. ...."

The following passages from Woodfall on Landlord and Tenant (26th Edition) appearing at pages 488, 504 and 506 are apposite. At page 488, the learned author says.

> " The action which can in such case be maintained is not to recover rent, but for damages due on an implied agreement to pay for the use of the landlord's property, and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant."

At page 504, the following passage occurs :

> " He who holds another's premises with his permission, but without an express bargain as to the rent, agrees to pay what a jury may find the occupation to be worth "

At page 506, the learned author proceeds to say·

> " But the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of the tenant holding over, and that such expectation was known to and not repudiated by the tenant "

The passage extracted from Halsbury is repeated in Hill and Redman's Law of Landlord and Tenant. It is not necessary for me to repeat the same. The basis on which a jury can assess a claim in the case of a quasi-contract or a quasi-tenancy, as the case may be, has been well laid down by Anson in his Law of Contract (21st Edition). At page 539, the learned author says that a quasi-contract is one under which the right to recover money does not arise from any agreement of the parties concerned, but is imposed by the law, so that in this respect a quasi-contract resembles a tort. The author says at page 540

> " The principle is, then, one of unjust benefit, or unjust enrichment; and this benefit may have been conferred on the defendant by the plaintiff himself, or by some person other than the plaintiff"

In the light of the above principles, it is very clear that Courts are not helpless in adjudicating the rights of parties in relation to quasi-tenancies or quasi-contracts. A common example which could be cited where Courts exercise such jurisdiction is, when amounts are paid under the doctrine of *quantom meruit* Even though no wages are fixed as between an employer and employee, and if the employer takes such services from the employee, and the latter works for him in the expectation of securing reasonable and lawful wages, then the law compels the employer to pay him reasonable wages under the doctrine of *quantum meruit*. This also is equally based on the principle of quasi-contract and avoidance of unjust enrichment It is an accepted canon of justice, euqity and good conscience that no one can enjoy other's properties to the detriment of that other Courts are zealous to checkmate such notorious aggrandisement and improper negation of the normal benefits to which the owner of a property would be entitled from his tenant We also find illustration of this equitalbe principle in section 70 of the Contract Act as well

The question, however, is as to how and in what manner Courts can afford reliefs to the affected party in such cases The Madras Cultivating Tenants' (Payment of Fair Rent) Act, 1956, whilst providing for the fixation of fair rent in the case of wet land where the normal produce is paddy, it avoids to advert itself to cases where the main crop is sugarcane, plantain or betel vines etc In the instant case, it is not in dispute that the tenant is raising, as his main crop, sugarcane. If sugarcane is the main crop raised by the tenant, nothing in Act XXIV of 1956 shall apply to such a land, during the period when such land is used for such a crop (section 15). That being so, the question arises whether Exhibit B-2, even if it could be considered as the fair rent fixed under Act XXIV of 1956 and within the meaning of section 4 of that Act, can at all have any effect on the claim projected, as at present, by the landlords, for an increased rent, on the basis that the tenant is raising sugarcane and not the ordinary wet crop of paddy In my view, the landlords could, and the plaintiffs in the instant case can, project such a claim.

My reasons are that, on the principles laid down by the learned authors as above, in a case where the tenancy does not expressly connote the rent payable by the tenant to the landlord, then the Courts have jurisdiction, as in the United Kingdom a jury has, to fix what is known as reasonable market rent for the property and avoid unjust enrichment to the tenant I have already stated that it would be the very negation of the rights of the landlord, if the tenant were to continue in occupation of the holding and raise a main crop like sugarcane to the detriment of the landlord and without his authority, and yet would refuse the lawful demand for payment of increased rent by the landlord as prevailing in the locality. Mr Justice Natesan, in an unreported decision in C R P. No. 1894 of 1962 had occasion to consider a very similar question, and was of the view that Courts could in such circumstances consider what can be the fair rent for the land in question. It was, of course, not necessary for the learned Judge to fix the rent in that case, as it proceeded on a different basis altogether.

Having thus far upheld the right of the landlords to reasonable compensation, so as to avoid unjust enrichment on the part of the tenant, what is the procedure to be adopted to fix such rent which was not the subject matter of agreement or arrangement between the landlords and the tenant ? The normal basis is the market rent or fair rent that is being obtained for similar land in similar locality in the vicinity In the instant case, evidence was let in to the effect that a sum of Rs. 5 per cent is the prevailing rent in the locality for such land cultivating sugarcane and plantain This was not adverted to by the learned District Munsif He dismissed the suit on the only ground that, in the absence of a contract between the parties or an enforceable arrangement which could be conceived by law, he was unable to interfere and grant the relief. This approach to the problem is obviously incorrect, because the landlords in such circumstances ought not to be left without a remedy He has a right to collect rent His suit cannot be summarily dismissed, even though he has such a right, because rights and remedies are correlated, and it is the duty of the

Court, in the exercise of its jurisdiction, to find a relief, so that the just rights can be worked out. It is no doubt true that the plaintiffs have claimed an amount as rent. But, under Order 7, rule 7, Civil Procedure Code, the Court is entitled to grant such relief as it thinks just and as it is necessary in the circumstances of a case. I am satisfied that this is a case in which, though the nomenclature employed by the plaintiffs is rent, yet they have to be paid reasonable compensation which has to be evaluated and which has not been done by the lower Court. The respondent is not represented and it would not be fair that I should embark upon such an enquiry in this civil revision petition in this Court. To enable the respondent to have an opportunity to let in evidence regarding the prevailing rent in the locality and also to enable the petitioners to state their case that Rs. 5 per cent is the reasonable rent payable by the respondent-defendant, I feel it is necessary, in the interests of justice, that the case should be remitted to the file of the learned District Munsif.

For the above purpose, while, therefore, setting aside the order of the learned District Munsif, the case is remitted to his file to have a fresh enquiry, as to the quantum of rent to which the petitioners-plaintiffs are entitled and which the respondent—defendant has to suffer in the circumstances. Both parties will be permitted to let in evidence. The costs will abide by the result.

V.M.K. ——— *Petitioner allowed Remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Sathiyamurthi Transport Co., Vellore .. *Petitioner**

v.

The State Transport Appellate Tribunal, Madras and others .. *Respondents*

Motor Vehicles Act (IV of 1939), *sections* 47 (3) *and* 64 (1) (i)—*Motor Vehicles Rules, Rule* 147 (*as amended by G.O. Ms. No.* 1852, *dated 28th May*, 1965)—*Order passed by R.T.A. under section* 47 (3)—*Appeal under section* 64 (1) (i) *by a existing operator—Competency.*

An existing operator, if he considers an order under section 47 (3) is prejudicial to him, is an aggrieved person. He is therefore entitled, in view of the recent amendment to rule 147 of the Motor Vehicles Rules, to prefer an appeal under section 64 (1) (*i*) of the Motor Vehicles Act, from an order passed by the Regional Transport Authority under section 47 (3).

Lakshminarain Agarwal v. *State Transport Authority*, U.P. (1968) 2 S.C.J. 74, followed. *Regional Transport Authority* v. *Mettupalayam Coonoor Service*, (1965) 1 M.L.J. 341 : I.L.R. (1964) 2 Mad. 641, held no longer good law.

Petitions under Article 226 of the Constitution praying the High Court to issue writs of *certiorari* calling for records connected with the order of the Tribunal in Appl. No. 336 of 1966 etc. and quash the orders therein.

M. N. Rangachari, V. C. Palaniswami, K. Thirumalai, V. Subramaniam, C. S. Prakasa Rao, G. Ramanswami and *A. R. Ramanathan*, for Petitioner.

S. Parthasarathi, M. Kalyanasundaram and The Government Pleader, for Respondents.

The Order of the Court was made by

Natesan, J.—In these writ petitions the short question for consideration is whether an existing operator can prefer an appeal as a person aggrieved under section 64 (1) (*i*) of the Motor Vehicle Act 1939, from an order passed by the Regional Transport Authority under section 47 (3). This question has been referred to a Bench by our learned brother Kailasam, J., in view of the decision of this Court in *Regional Transport Authority* v. *Mettupalayam Coonoor Service*[1], In that decision a Division

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*W.P. Nos. 2077 of 1966, etc. 10th January, 1968.

1. I.L.R. (1964) 2 Mad. 641: (1965) 1 M.L.J. 341.

Bench of this Court considered the question whether a revision can be filed against an order passed under section 47 (3). At the time the decision was given, no appeal was provided from an order under that section. Since then an amendment has been made to rule 147 of the Motor Vehicles Rules by G.O. Ms. No 1852, dated 28th May, 1967. The new sub-rule (2) of rule 147 runs thus :—

"Under clause (1) of sub-section (1) of section 64, the following orders of the Regional Transport Authority or its Secretary and the State Transport Authority or its Secretary shall also be appealable subject to the restrictions laid down in sub-rule (1)."

Then follow the orders that could be appealed against. The orders made appealable are set out in clauses (*a*) to (*m*) of sub-rule (2). By clause (1) an appeal is provided from an order passed by the Regional Transport Authority under sub-section (3) of section 47. But the provision for appeal under the sub-rule is subject to the restrictions laid down in sub-rule (1) of section 64, and the relevant provision gives right of appeal to a person aggrieved by any order which may be prescribed in section 64 (1) (1). So though the rule prescribes that an order passed under section 47 (3) is appelable, the appeal, can only be by an aggrieved person.

The question is whether an existing operator could be considered to be a person aggrieved by an order under section 47 (3) In the case referred to above the decision wherein necessitated the reference, after cobserving that the revisional power under section 64 (2) could be exercised only when a person seeking the exercise of that power is aggrieved, it is remarked (at page 346) :

"That an order under section 47 (3) is general in character has now been recognised in the recent decision of the Supreme Court *Abdul Mateen* v *Ramkailash*[1], to which we have made reference earlier. No existing operator can obviously be affected by a mere decision on the part of the Regional Transport Authority to put additional stage carriages on a particular route or to open up new route. His grievance can arise only if actually additional buses are put on the route, that is, when a permit is granted. . . . . . Therefore an existing operator cannot have any right to challenge the order of the Regional Transport Authority under section 47 (3)."

If this view has to hold the field, the right of appeal now provided will not be available to the existing operators. In the connected batch of writ petitions we have elaborately considered the position of an existing operator in relation to an order under section 47 (3) and we have expressed the view that an order under section 47 (3) may substantially affect him. But for the recent decision of the Supreme Court in *Lakshminarain Agarwal* v. *State Transport Authority, U P.*[2], which has been made available to us, it might have been necessary for us to refer the question now raised to a Full Bench. As it is, in view of this decision of the Supreme Court, we are absolved from the need for any elaborate consideration of the question In that case the Allahabad High Court was of the view that an existing operator had no say in the matter of determination of the strength on a route under sub-section (3) of section 47 and it was in the discretion of the Regional Transport Authority to determine the strength on a route, after considering the various matters enumerated in clauses (*a*) to (*f*) of sub-section (1) of section 47 The question was whether a revision lay under section 64-A of the Motor Vehicles Act, from an order under section 47 (3) by an existing operator.

Meeting the argument for the State, that no revision lay at the instance of an existing operator because he cannot be called an aggrieved person, the Supreme Court remarks —

"We are unable to say that no existing operator can be aggrieved by an order made under section 47 (3), increasing or decreasing the number of stage carriages; it would depend on the facts and circumstancs of each case. In a particular case it may be to his advantage and he then would not file a revision against it, but

1. (1963) 3 S.C.R 523. A I R 1963 S C 64 2 (1968) 2 S C J 74

if he files a revision when an order made under section 47 (3) is prejudicial to his interests, there is no ground for denying him the right to approach the revisional authority and seeking its order. An order under section 47 (3) affects the future working on a route and we are of the view that such an order would have repercussion on the working of the existing operators, whether for their good or not ".

It is clear that on the expression of opinion by the Supreme Court, the view taken by this Court in *Regional Transport Authority* v. *Mettupalayam Coonor Service*[1], cannot be considered as good law. An existing operator, if he considers an order under section 47 (3) is prejudicial to him, is an aggrieved person. He is, therefore entitled in view of the recent amendment, to prefer an appeal under section 64 (1). The orders of the Transport Appellate Tribunal rejecting the appeals before it as not maintainable, are set aside. The Appellate Tribunal will have to re-entertain the appeals on its file and dispose of them according to law. By writs of *certiorari* the orders passed by the State Transport Appellate Tribunal are quashed and the appeals released for fresh disposal. No order as to costs.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMI REDDY

Ramaswami .. *Accused**

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 2 (1) (i), 7 (1) *and* 16 (1) (a)—*Addition of preservative to the sample of milk seized and application of freezing point method—Analysts' report—Conviction, if sustainable.*

If formalin is added as a preservative in prescribed quantities, there cannot be any justification for any inference that the sample of milk seized might have undergone such alteration by natural causes as to render the analysis unreliable with regard to proof of adulteration. If it is clear from Analysts' report that he has applied the recognised method of analysis namely, Hortvet's freezing point method. Therefore the respondent has to be convicted under section 7 (1) read with sections 16 (1) (*a*) and 2 (1) (i) of the Prevention of Food Adulteration Act.

Crl.R C No. 1210 *of* 1967 (*Case Referred No.* 10 *of* 1967).—Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate (*J*), Madurai, in his letter dated 6th October, 1967.

C A. No 883 *of* 1967.—Appeal under section 417 of the Code of Criminal Procedure, 1898, against the order of acquittal made by the Court of the Sub-Divisional Magistrate, Usilampatti, in C C. No. 213 of 1967.

The Public Prosecutor, for Appellant.

R. Santanam, for Accused.

The Court made the following

ORDER.—The Criminal Revision Case is a reference by the District Magistrate, Madurai, and the Criminal Appeal has been preferred by the Public Prosecutor against the order of acquittal of the respondent by the Sub-Divisional Magistrate, Usilampatti. The order of acquittal by the Sub-Divisional Magistrate cannot at all be supported and the reasons given by the Magistrate are quite unsatisfactory.

The facts of the prosecution case are briefly these P W. 1, the Food Inspector, filed a complaint against the respondent under section 7 (1) read with section 16 (1) (*a*) and section 2 (1) (i) of the Prevention of Food Adulteration Act for having exposed for sale and sold a mixture of cow and buffalo's milk at Vanji Odai Street, Bodi, on 25th April, 1967, which on analysis was found to contain 33 per cent. of added water as calculated from the freezing point. The sample was taken by

1. I.L R (1964) 2 Mad. 641 (1965) 1 M L J 431

*Crl.R C No 1210 of 1967 7th March, 1968.
C Ref No. 10 of 1967 and C A. No. 883 of 1967.

the Food Inspector from the respondent on 25th April, 1967 He added 16 drops of formalin in each of the three sample bottles of milk in the presence of P W 2. He gave one sample bottle to the accused (respondent), sent one bottle to the Public Analyst and retained the third one himself The Public Analyst in his report Exhibit P-4 certified that the sample was preserved with formalin and that no change had taken place in the constitution of the article He has stated the analysis was done by him according to Hortvet's method of freezing point and he found that the sample contained 33 per cent of added water. The Sub-Divisional Magistrate acquitted the respondent on the grounds (1) that the quantum of water in terms of litre or millilitres has not been stated in the Analyst's report and (2) that the Food Inspector did not keep the sample of milk in refrigeration or ice before and during despatch of milk to the Analyst and therefore the report of the Analyst about adulteration cannot be safely relied upon The learned Sub-Divisional Magistrate relied upon the decision in *Gwalior Municipality* v *Kishan Swaroop*[1], which has no bearing at all to the facts of this case On the other hand, in In re, *Ayyavoo*[2], it was held that the certificate of the Public Analyst that no change had taken place in the constitution of the article that would interfere with the analysis would be sufficient It appears that this decision was not brought to the notice of the learned Sub-Divisional Magistrate In the case relied on by the Sub-Divisional Magistrate, rule 20 of the Prevention of Food Adulteration Rules was not complied with and the quantity of formalin added to the sample of milk was only half of the strength prescribed by the said rule. In the instant case, 16 drops of formalin were added to each of the sample bottles If formalin is added as a preservative in prescribed quantities there cannot be any justification for any inference that the sample seized might have undergone such alteration by natural causes as to render the analysis unreliable with regard to proof of adulteration It is also clear from the Analyst's report that he has applied the recognised method of analysis, namely, the freezing point method.

In these circumstances, the order of acquittal has to be set aside The respondent is convicted under section 7 (1) read with sections 16 (1) (*a*) and 2 (1) (1) of the Prevention of Food Adulteration Act, and taking the circumstances of the case, I impose a sentence of fine of Rs 25, in default to undergo two weeks simple imprisonment Time for payment of fine three weeks . The appeal is accordingly allowed and the reference is accepted.

V M K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K. VEERASWAMI.

Varadarajulu Naidu .. *Petitioner**

v.

Inthirani Ammal and another *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 58—Attachment before judgment followed by re-attachment after judgment—Effect—Second claim petition after re-attachment—Competency.

The effect of an attachment before judgment followed by a re-attachment after judgment would be that the attachment before judgment merges into the re-attachment. Where thus an earlier attachment merges into a later attachment a second claim petition would be competent notwithstanding the fact that an earlier claim petition preferred immediately after the earlier attachment had been dismissed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif of Kallakurichi in E A No 290 of 1965 in O S No. 252 of 1963

1. A I R 1965 M P 180 357. A I R 1964 Mad 490.
2. (1964) 1 M L J 443 (1964) M.L J (Crl)

*C R.P. No. 2516 of 1965. 8th February, 1968.

N. Varadarajan, for Petitioner.

R. G Rajan and *Ethirajulu*, for Respondents.

The Court delivered the following

JUDGMENT :—This is a petition to revise an order of the District Munsif of Kallakurichi allowing a claim petition filed by the two respondents There was an attachment before judgment on 28th March, 1963 The respondents preferred a claim which was dismissed on 16th August, 1963. The petitioner decree-holder applied on 18th July, 1964, for re-attachment after getting the decree transferred to the Court below for the purpose of execution That petition was dismissed on 26th September, 1964, for default of the decree-holder He took out another execution petition for re-attachment and sale It was at that stage the respondents again made a claim which has been allowed

It is urged for the petitioner that the second claim petition by the respondents was not maintainable This is on the ground that the attachment before judgment should be taken to continue right through I think that this means that the attachment before judgment and the re-attachment could co-exist, which can never be. The effect of re-attachment is that the attachment before judgment, assuming that it continued when the earlier petition was dismissed, merged in it. The result of it is the respondent would have another opportunity to file a claim This view seems to receive support from the observation of Ramesam, J, in *Meyyappa Chettiar* v *Chidambaram Chettiar*[1] The learned Judge said :

> "Just as the effect of the two attachments of the same property in execution of the same decree is merely that the property is under attachment, the first attachment merging in the second, similarly the effect of an attachment before judgment followed by a redundant re-attachment after judgment is merely that the property is under attachment In such cases, it is meaningless to say that the property is under two attachments It is still more meaningless to say that one attachment is dropped but another subsists All the earlier attachments, in all such cases, merge into the last."

Where the earlier attachment merges in the 'last', a second claim petition is competent, See *The Dharapuram Janopakara Nidhi Ltd.* v. *Lakshminarayana Chettiar*[2] which has been followed by me in S A. No. 316 of 1963.

The petition is dismissed with costs.

V K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI.

Annamalai .. *Petitioner**

Madras City Police Act (III of 1888), section 3—'Public place' meaning of—Tea-stall, if a public place.

On the question whether a tea-shop can be a public place under section 3 of the Madras City Police Act, *held* that a tea shop is a place to which the public can have access and they have a right to resort to a tea-shop and the keeper of the tea-shop cannot exclude any person who comes to his hotel to be served refreshments and therefore a tea-shop is a public place

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Special First Class Magistrate, Shevapet, dated 29th March, 1966 and passed in S T R. No 118 of 1966.

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1 (1924) I L R 47 Mad 483 : 46 M L J 415.

2 (1937) 1 M L J 642

*Crl R C No 974 of 1966 and Crl R. P. No 955 of 1966 6th December, 1967.

K. Sarvabhauman, for Petitioner.

Calvin Jacob. for Public Prosecutor, for State.

The Court made the following

ORDER —The petitioner has been convicted by the Special First Class Magistrate, Shevapet, under section 75 of the Madras City Police Act, for having been guilty of indecent behaviour in a public place, that is a tea-shop and sentenced to pay a fine of Rs. 10. The only point argued is that a tea-shop cannot be said to be a public place. ' Public place ' is defined in section 3 of the Act as meaning a place including a road, street or way, whether a throughfare or not, and a landing place to which the public are granted access or have a right to resort or over which they have a right to pass. In *Mangubhai* v. *Emperor*[1], a hotel has been held to be a place to which the public are permitted to have access In the *Crown Prosecutor* v. *Moonooswamy*[2], an arrack-shop has been held to be a public place within the meaning of section 75. In *Natarajan* v. *State*[3], a barber's saloon has been held to be a public place, as defined in section 3 of the City Police Act. There is no doubt that a tea shop is a place to which the public can have access and they have a right to resort to a tea-shop and the keeper of the tea-shop cannot exclude any person who comes to his hotel to be served refreshments. It is, therefore, quite clear that the tea-shop in this case would be a public place and consequently it should be held that the petitioner has been rightly convicted for having behaved indecently in a public place.

The Criminal Revision Case is, therefore, dismissed.

V M K. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Southern India Tannery, Tiruchirapplli ... *Petitioner**

v

The Industrial Tribunal, Madras and another .. *Respondents.*

Industrial Dispute—Gratuity scheme—Introduction of—Relevant factor—Dispute regarding necessity to frame a gratuity scheme for a concern—Reference to industrial Tribunal—Sponsoring of such dispute by a substantial number of workmen—Necessity.

That the financial resources of a concern would be a relevant factor for deciding the necessity of a gratuity scheme is settled by authority. It is also settled that the fact that one concern is required to frame a scheme and another similar concern is not so required will not amount to discrimination.

There can be no doubt that a dispute about the necessity to frame a gratuity scheme for the workers of a concern, is from the outset a collective industrial dispute and there is no question of the necessity of sponsoring such a dispute either by a majority of the workers in the concern or by a substantial number of them, before a reference could be made to the Industrial Tribunal.

Petition under Article 226 of the Constitution of India, praying the High Court to issue a writ of *certiorari* calling for the records of the first respondent in I.D. No. 31 of 1964 and quash its award, dated 14th December, 1964.

K. N. Balasubramaniam, for Petitioner.

S. Ramaswami, for Respondent No. 2.

The Court made the following

ORDER.— On a reference by the Government of Madras, the Industrial Tribunal Madras, considered the issue whether the demand of the workers employed in certain tanneries in Tiruchirapalli for the introduction of a Gratuity Scheme is justified

1. A I R 1930 Bom 369
2. (1910) I L.R 33 Mad 83.
3. (1963) M W.N. (Crl) 172

* W.P. No 776 of 1965 28th September, 1967.

and if so to formulate a scheme, in I D, No. 31 of 1964 There were nine tanneries concerned in this case They were all respondents as against the Secretary, Tiruchi Tannery Workers Union, Tiruchi, who was the claimant. The Southern India Tannery, Tiruchirapalli, the petitioner in this writ petitions; was the fifth respondent in the industrial dispute. The Tribunal came to the conclusion that in respect of tanneries other than the petitioner herein, their financial position was so poor that the burden of a gratuity scheme, if imposed on them, would be ' the last straw that would break the camel's back.' But no such impediment arose in the case of the petitioner whose financial position was considered quite sound, and that justified the introduction of a gratuity scheme ; and a detailed gratuity scheme was also outlined in the order of the Industrial Tribunal. Apparently, there was an argument before the Tribunal that the reference by the Government regarding the dispute, above mentioned was not sponsored by a majority of the employees of the establishment who were also members of the Union and who claimed the benefits. But the Tribunal observed that from the outset this was not an individual dispute, but a collective dispute affecting all the workers in the petitioner's establishment and therefore there was no necessity for the dispute being sponsored by a majority of the employees of the establishment or at least by a substantial number of them. Finally, the Tribunal framed a scheme in respect of the employees in the petitioner's concern and desisted from doing so in the case of the remaining concerns

Against the above order of the Tribunal, the petitioner has filed this writ petition under Article 226 of the Constitution of India praying for the issue of a writ of *certiorari* quashing the order of the Tribunal.

When the writ petition came on for hearing, the learned Counsel appearing for the petitioner has not been able to contradict the findings of the Tribunal that all the tanneries, except the fifth respondent therein, had very poor and limited resources and that the framing of a gratuity scheme would be an additional burden, which they would not be able to bear. But such a consideration will not apply to the case of the petitioner In fact, the order of the Tribunal shows that all the respondents, except the petitioner herein, filed their profit and loss accounts and balance-sheets to substantiate their contention about their limited resources. But the petitioner refrained from doing so. Even in the affidavit set out in the writ petition, this petitioner has not alleged that his financial position is such that the gratuity scheme would be an intolerable burden on him. That the financial resources of a concern would be a relevant factor for deciding the necessity of a gratuity scheme is settled by authority. It is also settled that the fact that one concern is required to frame a scheme and another concern is not so required will not amount to discrimination. In *Gujarat Engineering Co.* v. *Ahmedabad Mis. Industrial Workers Union*[1], the Supreme Court has observed as below .—

> " The fact that in similar other concerns there is no gratuity scheme for the benefit of workmen must be held immaterial in adjudicating on the demand for introduction of a gratuity scheme. The proper way to look at the problem is that if a gratuity scheme can be introduced in a concern taking into account its financial position, it should not be refused simply because no gratuity scheme is in force in similar other concerns."

Consequently, no substantial objection could exist for the framing of a gratuity scheme so far as the petitioner is concerned The petitioner has not attacked the details of the gratuity scheme framed by the Tribunal. In fact it appears to be a reasonable scheme which will not be an undue burden on the management.

The further argument of the learned Counsel for the petitioner is that the dispute referred by the Government to the Industrial Tribunal for adjudication is not a collective industrial dispute, because the requisite number of members of the establishment have not sponsored the resolution of the Union concerning the dispute. But the learned Counsel for the respondent points out that the principle about the

1. (1961) 2 L.L.J. 660.

sponsoring of an individual dispute by a collective body of workmen was laid down in *Bombay Union of Journalists* v *Hindu, Bombay*[1], while dealing with a dispute which at the outset was only an individual dispute For ascertaining whether what was at the inception an individual dispute, had acquired the character of a collective dispute, the test is whether at the date of the reference, the dispute was taken up or was supported by the Union of the workmen or by an appreciable number of the workmen of the employer, against whom the dispute is raised by an individual workmen This principle has been laid down by the Supreme Court in *Workmen* v. *Dharampal Premchand*[2]. There can be no doubt that a dispute about the necessity to frame a gratuity scheme for the workers of a concern, is from the outset a collective industrial dispute and there is no question of the necessity of sponsoring such a dispute either by a majority of the workers in the concern or by a substantial number of them, before a reference could be made to the Industrial Tribunal to deal with it. There are no merits in this writ petition which is dismissed with costs. Advocate's fee Rs 150.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K VEERASWAMI AND MR JUSTICE T RAMAPRASADA RAO.

The Deputy Commissioner of Commercial Taxes, Madurai Dn *Petitioner**

v.

Sri Ravi Auto Stores, Dealers in Auto Spare Parts by its partners S. Tharmarajan and another . *Respondents.*

Madras General Sales Tax Act (I of 1959), Schedule I, Entry 41—"Electrical goods"—What are—Welding electrodes—If "electrical goods" to attract Entry 41.

Though the words "electrical goods" are easily understood in common parlance, it is one of those cases which are more easily understood than defined satisfactorily It is neither possible nor desirable to embark on a preparation of an exhaustive list of what constitutes electrical goods, within the meaning of Entry 41.

To attract Entry 41, intrinsically the goods in question must be "electrical goods" and secondly their use cannot be had without electrical energy Merely because an article cannot be used without electricity, it may not be decisive It is necessary that apart from that fact, the article by its very nature, answers the description "electrical goods"

Welding electrodes, though cannot be used without electrical energy in welding process, do not appear by themselves to be "electrical goods" as to attract tax under Entry 41.

Petition under section 38 of Act I of 1959 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madurai, dated 10th January, 1964 in T.A. No 16 of 1963 etc

K. Venkataswami, The Additional Government Pleader, for Petitioner

S. Jayalakshmi Shanmughavel, for Respondents.

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1. (1962) 2 S C J 107: (1962) 3 S C R 893 (1961) 2 L L J 436

2. (1965) 2 S C J 818 (1965) 3 S C R 394: (1965) 1 L L J 668.

* T.C. No. 140 of 1964 (Revn. 84). 20th June, 1967.

The Judgment of the Court was delivered by

Veeraswami, J.—The question in this case, is whether welding electrodes are electrical goods, to attract Entry 41 of Schedule I to the Madras General Sales Tax Act of 1959 The Tribunal has taken the view that they are not. Its reasoning is that in the instant case welding electrodes are not themselves used with electrical energy This is with reference to the language employed by Entry 41, which is

> " All electrical goods, instruments, apparatus, appliances and all such material the use of which cannot be had except with the application of electrical energy, including fans, lighting bulbs, electrical earthernwares and porcelain and all other accessories and component parts either sold as a whole or in parts "

The aspect of the entry relating to the use of the article with electricity only was introduced for the first time in 1959 Prior to that, section 3 (2) (*v*) the predecessor of the present Entry 41 was

> " All electrical goods, instruments, apparatus and appliances, including fans and lighting bulbs, electrical earthernware and porcelain and all other accessories".

Articles which fell within Entry 41 are taxable at the point of first sale in the State at six per cent.

It is contended for the Revenue, which is the petitioner before us, that, since welding electrodes cannot be used except with the application of electrical energy, they should be regarded as electrical goods attracting Entry 41. In our view, the argument lays too much stress on the user of the article with electrical energy. That, no doubt, is a test for purposes of Entry 41, but is not the only test. Before applying the test, the goods must be capable of classification as electrical goods Though the words are easily understood in common parlance, it is one of those cases which are more easily understood than defined satisfactorily. Also, as pointed out by this Court in *William Jacks and Co Ltd* v *State of Madras*[2], it is neither possible nor desirable to embark on a preparation of an exhaustive list of what constitute ' electrical goods,' within the meaning of Entry 41. But we are not satisfied that the Tribunal, in the view it took, was erroneous In *William Jacks and Co Ltd* v *State of Madras*[1], this Court held that a lathe fitted with electrical motor which could not be used except with electrical power was not by itself " electrical goods," Intrinsically, the goods in question must be electrical goods and secondly their use cannot be had without electrical energy Merely because an article cannot be used without electricity, it may not be decisive It is necessary that, apart from that fact, the article by its very nature, answers the description of electrical goods For instance, the use of a motor car cannot be had without batteries or dynamo fitted to it. But on that account, can it be said that motor car is ' electrical goods '? The answer it seems to us, should be in the negative

Likewise, in electro-plating, solution of silver or gold particles is used through which electricity is passed in the process of electro-plating In our view, because electro-plating by that process, cannot be had without the use of electricity, it cannot be said that the silver or gold particles are electrical goods by themselves. In the same way, electrodes, though cannot be used without electrical energy in welding process do not appear by themselves to be electrical goods. What after all, is the difference between silver or gold particles in the solution used in the process of electroplating and welding electrodes, except that, in the latter case, instead of electrodes being in the form of particles, they are in the form of solid rods ? These copper rods styled as electrodes are conductors of electicity and electricity is used for the purpose of heating up the pointed ends of the rods in the process of welding so that in the very process the copper rods gradually disappear We do not say that this phenomenon by itself entirely contributes to testing whether electrodes by themselves are electrical goods What we have in mind is that electrodes are but copper rods which are melted by electrical power in welding. Looked at from that

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1. (1955) 2 M L J 252 (1955) 6 S T C 301. 2 (1960) 2 M L J. 155 : (1960) 11 S T C 340.

point of view, it seems to us that welding electrodes are not by themselves electrical goods That is the view the Tribunal has taken and, in any case, we are unable to say that it is incorrect

The petition is dismissed with costs Counsel fee Rs 100

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K VEERASWAMI AND MR JUSTICE A ALAGIRISWAMI.

K. S. Doraiswami Nadar (died) and others *Appellants**

v.

Vinayaka Ratnaswami Nadar and others *Respondents*

Limitation Act (IX of 1908), Articles 136 and 137—Suit for partition—Suit pending, if any number of applications for final decree permissible.

Partition suit—Preliminary decree passed, but suit subsequently dismissed—Dismissal of the suit, if within the power of the Court.

In a pending partition suit, any number of applications for passing final decree in parts are permissible.

The Court of the Subordinate Judge itself having passed the preliminary decree, it was entirely beyond its power to dismiss the suit which would have the effect of nullifying the preliminary decree.

Appeal against the order in I A. No. 3 of 1961 in O S No 44 of 1953 and the decree in Original Suit No 44 of 1953 on the file of the Court of the Subordinate Judge, Tirunelveli, dated 29th September, 1961.

S. Sitarama Iyer and *S Rajarama Ayyar*, for Appellant.

V. Ratnam, for 2nd Respondent.

The Judgment of the Court was delivered by

Veerswami, J —The order of the Court below appears to be clearly wrong The first appellant who was the plaintiff-alienee of the properties comprised in Schedule 1 to the plaint sued for partition and separate possession thereof, impleading the two sons of the late Chokkalinga Nadar and his two widows as well as some alienees. A preliminary decree for partition was passed on 26th November, 1954, by compromise. The application for passing a final decree was made on 30th July, 1960 and 8th December, 1960 The Subordinate Judge took the view that the application was out of time and dismissed it. Curiously he also dismissed the suit.

The reason for the order of the Court below is based on clause 3 of the preliminary decree which is

"3 That the parties shall be at liberty to apply for final decree but since the subject-matter of the several items of properties which are in the possession of various defendants herein is also the subject-matter of the two appeals against the decrees of this Court in O.S No. 149 of 1951 and O.S. No 74 of 1952 pending before the High Court, the parties shall apply for a final decree after the result of the said two appeals and that if the two appeals are not disposed of within three years from this date the parties be at liberty to apply for final decree so as to be in time"

The Subordinate Judge thought that the application for final decree should have been filed at least within three months of the disposal of appeals on 2nd August, 1957 There is something to be said in support of this interpretation But what the Subordinate Judge completely overlooked was that an application for passing a final decree in a partition suit is not in execution but in a pending suit and as such

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* Appeal No. 161 of 1962. 17th September, 1968.

any number of applications for passing final decree in parts are permissible Neither Article 136 nor Article 137 in the present Limitation Act nor the corresponding articles in the repealed enactment would apply to applications for passing final decrees This position is so well settled that it is hardly necessary to refer to any authority The Subordinate Judge was also wrong in dismissing the suit itself without appreciating its implications The Court of the Subordinate Judge itself has passed the preliminary decree and it was entirely beyond its power, therefore, to dismiss the suit which would have the effect of nullifying the preliminary decree

The appeal is allowed and the order of the Court below is set aside. The application for passing final decree will be restored to its file and be disposed of according to law No costs

V.M K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE K. VEERASWAMI

Chinnaswami Naicker *Petitioner**

v.

Kandasami Goundar and others *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—When can be allowed

In the absence of an enabling provision, if on the date the application for amendment was made the suit would have been barred by limitation, there is no escape but that the application has got to be dismissed on the ground of limitation. No doubt amendment of pleading should be freely allowed, at whatever stage it is asked for But, this can only be subject to pleas as to limitation or other prejudice to the other party. The principle is that an application for amendment of the pleading should be within the time allowed for the institution of the suit.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Periakulam, dated 4th September, 1967 and made in I A No 878 of 1967 in O S No. 773 of 1966 and I A No 877 of 1967 in O S No. 773 of 1968 respectively.

K. S. Desikan, for Petitioner

T P Gopalakrishna Ayyar, for Respondents.

The Court made the following

ORDER —In my view the decision of the Court below is correct The summary order was made on 16th June, 1966 There is no dispute that the suit should be instituted within a year of that date, and that, it should be in a representative capacity Vide *Madina Bibi* v *Ismail Durga Association*[1], The suit was filed on 5th September, 1966 and the written statement on 21st November, 1966 The defendants pointed out, in the written statement, the defect, to wit, the suit was not in a representative capacity The issues were framed on 28th November, 1966 and the suit came up for trial twice, but was adjourned every time The petition for amending the plaint, to make the suit a representative one, was filed only on 21st July, 1967. The Court below took the view that the application should be dismissed on the ground of limitation.

The view taken by the Court below is unsustainable No doubt amendment of pleading should be freely allowed, at whatever stage it is asked for But, this can only be subject the pleas as to limitation or other prejudice to the other party. If the suit had been instituted on 21st July, 1967 it would undoubtedly be barred by limitation Mr. Desikan for the petitioner urges that *Madina Bibi* v *Ismail Durga Association*[1], is distinguishable on the ground that there application for amend-

* C R P Nos 1802 and 1803 of 1967 25th October, 1968.

1. I.L R (1940) Mad 808 (1940) 1 M L J. 872 . A I R 1940 Mad 789.

ment of the plaint was taken out after issues had been framed and the trial held thereon But I see no difference in principle, whether the amendment is sought for after the expiry of the period of limitation and at the stage of trial, before or after The principle is that an application for amendment of the pleading should be within the time allowed for the institution of the suit

Reference for the petitioner is also made to *Ayyamperumal Chettiar* v *Palniandi Chettiar*[1]. Ramaswami, J, held, in similar circumstances, that an amendment should be freely allowed That was a suit by an attaching creditor under Order 21, rule 63 of the Code of Civil Procedure to establish his right to attach and bring to sale certain property by avoiding a transfer of the property on the ground that it had been made with the intent to defeat his claim The learned Judge, in view of *Madina Bibi* v *Ismail Durga Association*[2], was aware that such a suit should be brought in a representative capacity in compliance with Order 1, rule 8 of the Code On the question of limitation, the learned Judge observed that it was by then well settled that in a suit of this nature, where on account of ignorance or misapprehension there was no prayer that the decree that may be passed should be for the benefit of all the creditors, amendment should be freely allowed even at a late stage

With respect, I am not able to share that view The question is one of limitation and not one of sympathy or expediency If excusing the delay is permissible, that is another matter. In the absence of an enabling provision, I do not see how, if on the date the application for amendment was made the suit would have been barred by limitation, there is any escape but that the application has got to be dismissed on the ground of limitation, and that is the principle laid down in *Madina Bibi* v *Ismail Durga Association*[2] As I said, on principle that case is not distinguishable from the instant one

The petitions are dismissed, but with no costs

S V J — *Petitions dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE M NATESAN

The Municipal Council, Karur, represented by its Commissioner *Appellant**

v.

V Pasupathi Muthuraja . *Respondent.*

Contract Act (IX of 1872), sections 5 and 25—Madras District Municipalities Act, sections 68, 68-A and 69—Public auction by Commissioner—Highest bidder withdrawing his bid before acceptance by Council, the only authority to accept offer—Effect of withdrawal—Contract, whether concluded—Liability of the highest bidder for damages for breach of contract

It is a well established rule that at an auction, the auctioneers calling for bids is not an offer, which is accepted by the highest bidder It is the bid that constitutes an offer and the auctioneer may accept or reject the bid Before its acceptance, the bidder has the liberty of revoking his offer Quite often in conditions of auction sale, a provision is found that bidding shall not be retracted The term as such would be inoperative in law there being no consideration for assenting not to retract from the bid That there may be an obligation not to retract, it must be supported by consideration or there must be some statutory provision having the force of law providing against the withdrawal of the bid

Only a concluded contract can bind both the parties and for such a contract to come into existence, the offer and related acceptance must be absolute and not qualified or conditional A provision not to resile from an offer before final

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1 (1958) 2 M L J 540 872 A.I R 1940 Mad 789.
2 I L R (1940) Mad 808 (1940) 1 M.L J.
*S A No 669 of 1963. 24th March, 1967.

acceptance, unless supported by consideration, has no legal validity and what is called a provisional acceptance by the offeree could be withdrawn before the performance of the conditions of the provisional acceptance Till then there can be no contract in law and neither party would be bound Once the terms of the provisional acceptance are fulfilled it becomes a concluded contract and neither party can resile In the absence of any legal obstacle a bid could be withdrawn before the contract gets completed by final acceptance, however, the intermediate situation pending the final act on the offeree's side which would bring about a concluded contract is termed, provisional acceptance, conditional acceptance or qualified acceptance.

On facts held, that there was no contract between the Municipality and the defendant The Commissioner, who conducted the auction had no authority to enter into any contract or accept any bid, and the offer had been withdrawn before it could be accepted by the Council, the only authority that could accept the offer There was no contract for the defendant to be charged with for breach.

Appeal against the Decree of the Court of the Subordinate Judge, Tiruchirapalli, dated 30th August, 1962 in Appeal Suit No 150 of 1962 preferred against the Decree of the Court of the District Munsif of Karur, in Original Suit No 429 of 1960

G Ramanujam and *K Gopalaswami* for Appellant.

S. Amudachari, for Respondent.

The Court delivered the following

JUDGMENT —The Municipal Council, Karur, has preferred this Second Appeal against the decision of the learned Subordinate Judge of Tiruchirappalli, reversing that of the District Munsif, Karur, and dismissing the Municipality's suit for recovery of a sum of Rs 2,651 as damages from the respondent herein The facts, which have led up to this appeal may be briefly stated At a public auction held of the Non-Vegetarian Tea Stall near the Karur Municipal Bus Stand for the year 1960-61, by the Commissioner of the Municipality on 15th February, 1960, the respondent was the highest bidder, his bid being a rent of Rs 276 per mensem The next bid was Rs 275 per mensem Before the acceptance of the bid by the Municipal Council, the defendant on 23rd February, 1960 revoked the bid and requested the Council not to accept his bid Nevertheless, the Council on 8th March, 1960, passed a resolution accepting the defendant's bid and on the defendant refusing to execute a rent deed and pay advance as provided for under the terms of the lease, conducted a re-auction on 22nd April, 1960 The highest bid at the re-auction was a rent of Rs 51 per mensem The Municipality accepting this bid, has filed the suit against the defendant claiming the difference in bids for the year as damages It is the defendant's case that the price was boosted at the original auction by some of the Municipal officials, the rival bidders being persons of no substance or means and that in the previous year the bid was only Rs 10 per mensem He found that a fraud had been played upon him and therefore, withdrew his bid before its acceptance He contended that there was no completed contract for any breach and to sustain any liability for damages He further pointed out that the Municipality could have under the terms of the auction, accepted the next immediate bid of Rs 275 per mensem instead of holding a re-auction

The principal question for consideration is, whether there is a concluded contract on 15th February, 1960 when the defendant's bid was the highest and was reserved by the Commissioner of the Council, who conducted the auction for acceptance of the bid by the Municipal Council While it is contended for the Municipality that there has been a conditional acceptance of the bid subject to affirmation by the Council, it is the case of the defendant that there was and there could be no acceptance of the bid by the Commissioner and that therefore, there was no contract till the acceptance of the bid by the Council Before its acceptance, he had duly revoked the offer

The lease in this case was offered by public auction conducted by the Commissioner of the Municipality It is a well-established rule that at an auction,

the auctioneers calling for bids is not an offer, which is accepted by the highest bidder It is the bid that constitutes an offer and the auctioneer may accept or reject the bid Before its acceptance, the bidder has the liberty of revoking his offer It may also be stated that quite often in conditions of auction sale, a proviso is found that bidding shall not be retracted The term as such would be inoperative in law there being no consideration for assenting not to retract from the bid To imply such a term is to postulate that there is a contract to enter into a contract That there may be an obligation not to retract, it must be supported by consideration or there must be some statutory provision having the force of law providing against the withdrawal of the bid Section 5 of the Indian Contract Act entitles the maker of a proposal to revoke the proposal at any time before the communication of its acceptance is complete as against him It is based on the principle found in section 25 of the Act that an agreement made without consideration is void What has to be seen now is whether there has been an acceptance of the bid preventing the defendant from resiling, or there is any provision under the Madras District Municipalities Act or the statutory rules made thereunder having the force of law which would create a statutory bar against the withdrawal of bids at a Municipal auction Sections 68, 68-A and section 69 of the District Municipalities Act deal with contracts by Municipalities Section 68 (1) provides that the Council may delegate to the Chairman or a committee consisting of two or more members the power of making on its behalf any contract whereof the value or amount does not exceed Rs 1,000 and sub-clause (2) provides that in respect of a contract whereof the value or amount exceeds Rs 1,000 the sanction of the council for the making thereof should be obtained before the same is made Section 68-A provides for rules being prescribed regarding the conditions on which contracts may be made and the mode in which contracts may be made or sanctioned by or on behalf of of the Municipal Councils and section 69 deals with mode of executing contracts The learned Counsel appearing for the Municipality has not drawn my attention to any statutory rule or provision which would enable the Municipality to impose as a condition at its auctions that a bid made to the Commissioner shall not be withdrawn before acceptance or refusal by the Municipal Council The matter has, therefore, to be examined under the ordinary law governing contracts between private parties

The contract in this case is a lease for a period of one year and the value exceeds Rs 1,000 The Municipal Council is therefore the authority that has to sanction and accept the contract and that is not in dispute The auction was held by the Commissioner and it is not contended that the Commissioner had any power in himself to accept the bid and conclude the contract of lease Clause 4 of the conditions of lease provides for initial cash deposit by intending bidders Without such deposit a person would not be permitted to bid It reads, that on the conclusion of the auction the deposits made by the unsuccessful bidders would be returned and that at his discretion the Commissioner may retain also the deposit of the next highest bidder till the auction was confirmed by the Council or the Committee for acceptance on their sanction The Commissioner may for reasons, exclude from the auction any person and refuse to accept his deposit He may also refuse to accept any bids The most important condition is 11 in terms of which after the close of the auction, the auction lists have to be placed before the Municipal Council for approval in accordance with section 68 of the District Municipalities Act The Council alone, the condition provides, has got the right to select and approve the bid and grant the lease The Council has power to reject the highest bid or any other bid without showing any reason to the bidder and no claim for damages could be made on such rejection There are provisions for execution of the document, evidencing the contract registration, etc , on the acceptance of a bid Here, we are not concerned with the same What is relevant for us is that the conditions of the auction as they stand, show no power in the Commissioner, who conducts the auction to accept the highest bid The District Municipalities Act does not permit him to do so The final acceptance of the bid is left to the Council. The Commissioner has only to carry to the Council the bids

Counsel on both sides relied on and referred to the decision of Satyanarayana Rao, J, in *Rajanagaram Village Co-operative Society* v *Veeraswami Mudali*[1] In that case a property was put up in auction by the Co-operative Society and the sale was got knocked down in favour of the highest bidder subject to the approval of a Mahasabha and the Chittoor District Central Bank The sale was approved by resolution of the Bank and there was no question that the Mahasabha had not approved the same The only point was, the resolution of the Bank was not communicated to the successful bidder When he demanded a conveyance, the Bank cancelled its resolution and directed a resale of the property, which resulted in the suit for specific performance giving rise to the second appeal Satyanarayana Rao, J, observed in the course of the judgment as follows —

> "An absolute acceptance is whether the sale officer, or the auctioneer as the case may be, is given full authority to accept a bid unconditionally A provisional acceptance means that the auctioneer had only a right to receive the bids and pass them on to his superior, who is the final authority to confirm and conclude the contract In that case the auctioneer acts merely as a sort of conduit pipe to convey the highest bid to the superior Conditional acceptance has the effect of binding the highest bidder to the contract if finally there is the approval or confirmation by the superior person indicated in the terms of sale He cannot resile from the contract, it is not open to him to withdraw the offer as in the case of a provisional acceptance and if there is approval the contract becomes concluded and becomes enforceable"

The Courts below rely upon the aforesaid decision for their different views in the present case The learned District Munsif thought that there was a conditional acceptance of the offer by the Commissioner of the Municipality and that therefore, the auction bidder cannot withdraw his bid The learned Subordinate Judge concludes that this is a case of a provisional acceptance and therefore, the bidder could at any time withdraw before acceptance by the Council The learned District Munsif has clearly misunderstood the decision On the facts, the present would be a case of provisional acceptance as found in appeal The reference to conditional acceptance in the above cited decision does no doubt give some difficulty. It has been the subject of criticism by a Division Bench of the Andhra Pradesh High Court in *Raghunadha Reddy* v *State of Hyderabad*[2], and in Pollock and Mulla's Indian Contract Act, 8th edition An acceptance which is qualified ceased to be an acceptance that could complete a contract in law It is pointed out in the decision of the Andhra Pradesh High Court, that where the offer and acceptance culminating in a concluded contract are themselves subject to conditions and are not final, there is no contract at all till the conditions are fulfilled and an offer before the fulfilment of these conditions can be withdrawn The Editors of Pollock and Mulla's Indian Contract Act consider that *Rajanagaram Village Co-operative Society* v *Veerswami Mudali*[1], is a case of a condition precedent where the bidder could have retracted his offer before final acceptance That is how I also view the case and on my reading of the case I do not think that the learned Judge Satyanarayana Rao, J, viewed otherwise The learned Editors dissent from what they see as the reasoning in the case that even when the offeree has full power to accept the offer, if he gives only a qualified acceptance, the offerer cannot withdraw although the offeree is not finally bound by it, and point out that acceptance is either absolute or conditional and there cannot be any half way between the two I have examined the decision in *Rajanagaram Village Co-operative Society* v *Veeraswami Mudali*[1], with great care and in my view the observations therein are with reference to the facts of the case In that case admittedly the sale officer had authority to accept the bid on behalf of the defendant The bid had also been approved by the Mahasabha and the Bank Before a formal communication of the approval when the offeror claimed specific performance, the society resiled from the contract In the circumstances, all that the learned Judge particularly decides is, that once a conditional acceptance is communicated, there is no need or necessity for a further communication of

1 (1950) 2 M L J 486

2. (1962) 1 An.W R 385

the fulfilment of the condition The communication of the acceptance twice is not needed, that is, once when the conditional acceptance is made and again when the condition is fulfilled

Now under section 4 of the Indian Contract Act the communication or acceptance is complete as against the proposer when it is put in the course of transmission to him so as to be out of the power of the acceptor and as against the acceptor, when it comes to the knowledge of the proposer It is in the light of section 3 of the Indian Contract Act, the above principles relating to acceptance in section 4 and in the context of the facts of the case the observations of the learned Judge have to be read The learned Judge has proceeded in the view that there was due acceptance of the contract In the case of an auction by a statutory or public authority where there are provisions governing the acceptance of contracts on behalf of the authority, and the terms of the auction indicate the same, one may if the features of the auction warrant infer that specific communication of the final acceptance is dispensed with by the offeror when there is a conditional acceptance and the final acceptance is the formal official act of acceptance of the authority Waiver of communication of acceptance may be inferred from the nature of the transaction, as in *Dominion Building Corporation Ltd* v *The King*[1], a case of offer to a public authority, when there is a public act of acceptance by order in council. I do not understand the learned Judge as sanctioning the position, that before the approval of the contract by the Mahasabha and the Bank in that case, the offeror could not have withdrawn, that would be going against the fundamental principles of the law of contract In that case, the suit was by the offeror to enforce the contract as a concluded one The learned Judge only says that on approval, the contract becomes concluded and enforceable In the context, to my mind, these observations involve the view that till approval, it does not bind the bidder also The bidder could have withdrawn before the approval by the Mahasabha and the Bank, as there was no plea that conditions of the sale having statutory force prevented the withdrawal of the bid The only distinction the learned Judge makes between provisional acceptance and conditional acceptance is that in the latter case, no further communication of the final acceptance is necessary at the completion of the contract In the case of a conditional acceptance defined by the learned Judge the person who takes the bid has the power to accept subject to approval by a superior authority That is not to say that there is a binding contract on the one side and not on the other, when there is what is called conditional acceptance It is not necessary for the purpose of the present case to discuss the rule as to communication of acceptance in the case of provisional or conditional acceptance of the contract The reasoning of the learned Judge does not, as I see it, run counter to the statement of the law in Pollock and Mulla that if an acceptance is conditional, the offeror can withdraw at any moment until the absolute acceptance has taken place Only a concluded contract can bind both the parties and for such a contract to come into existence, the offer and related acceptance must be absolute and not qualified or conditional Conditional acceptance here considered must be distinguished from contracts entered into conditionally, that is, cases of conditions subsequent These expressions, 'provisional acceptance' and 'conditional acceptance' are not statutory phrases, but convenient words coined to denote a stage in the formation of the contract They indicate one thing with certainty, that the proposal or offer has been made and communicated and that it has not been finally accepted To my mind there can be no two views about it, that conditional acceptance if by that is meant, some condition to be fulfilled for the acceptance of the contract to be binding, any consensus of other parties on the offeree's side having a decisive voice in the matter of the acceptance of the offer before acceptance becomes absolute, is no acceptance at all In such a case, the offer is still under consideration at the other end to use a more popular expression still in the stage of negotiation, awaiting acceptance to bring about a contract There is either an acceptance of the offer or not, and only

1 L R (1933) A C 533

if there is acceptance by those who could decisively accept subject to provisions relating to communication of acceptance, the contract comes into existence

In *Somasundaram Pillai* v *Provincial Government of Madras*[1] the Division Bench observes

> " To have an enforceable contract there must be an offer and unconditional acceptance A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration Does the fact that there has been provisional acceptance make any difference ? We can see no reason why it should A provisional acceptance cannot in itself make a binding contract There must be a definite acceptance or the fulfilment of the condition on which a provisional acceptance is based "

The aforesaid observations make it clear that a provision not to resile from an offer before final acceptance, unless supported by consideration, has no legal validity and what is called a provisional acceptance by the offeree could be withdrawn before the performance of the conditions of the provisional acceptance Till then there can be no contract in law and neither party would be bound. Once the terms of the provisional acceptance are fulfilled it becomes a concluded contract and neither party can resile I would put it, in the absence of any legal obstacle a bid could be withdrawn before the contract gets completed by final acceptance, however, the intermediate situation pending the final act on the offeree's side which would bring about a concluded contract is termed, provisional acceptance, conditional acceptance or qualified acceptance

In the light of the above discussion it is clear that there was no contract in the present case between the Municipality and the defendant The Commissioner, who conducted the auction had no authority to enter into any contract or accept any bid He had to carry the highest bid to the Council for its consideration and before the Council by its resolution accepted the bid, the defendant had specifically and in writing revoked his bid and requested the Council not to confirm the lease. The offer had been withdrawn before it could be accepted by the Council, the only authority that could accept the offer There was nothing to forbid revocation of the bid before its acceptance Under section 5 of the Indian Contract Act, an offer may be revoked at any time before the communication of its acceptance is complete as against the proposer In the present case, there has been no acceptance of the offer by the Municipality before the revocation of the proposal. It follows that there was no contract for the defendant to be charged with for breach.

In the result, the second appeal fails and is dismissed with costs No leave.

S.V.J. *Appeal dismissed.*

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1. I.L.R (1947) Mad. 837 . (1947) 1 M.L.J. 123.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction.)

PRESENT —MR M ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M NATESAN

A Venugopala Chettiar . *Appellant**

v.

The State represented by the Secretary, Food and Agriculture Department, Madras and others *Respondents*

Madras Foodgrains Dealers Licensing Order (1958)—*Licensee under—Punishment of suspension of licence imposed, by concerned authority, on the ground that several charges of infringement of the terms of licence were proved—Court, in writ proceedings, however, holding that only one charge was duly proved—Order of suspension if can be sustained by Court*

Where the punishment of suspension of licence for a specified period was imposed on a holder of a licence under the Madras Foodgrains Dealers Licensing Order on the ground that the several charges framed against him for alleged infringement of the terms of the licence were duly proved, but the Court in a writ petition filed against this order is of opinion that only one of the charges could be said to have been substantiated, the Court can still sustain the punishment imposed if it is satisfied that the authority would have passed the order on the basis of the charge proved

State of Maharashtra v *Takkamore*, (1967) 2 S C J 705 . A I.R. 1967 S.C. 1353, relied on

Obviously, this is a question of the actual facts and the extent to which a reasonable nexus can be established, between the surviving charge and the punishment imposed.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Srinivasan dated 19th August, 1963, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 533 of 1961 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G O Ms No 1350, dated 12th April, 1961, on the file of the Government of Madras confirming the order of the District Revenue Officer, Thanjavur in R C No 38659/60 G-8, dated 15th August, 1960, confirming the order of the Commercial Tax Officer, Thanjavur in R C. No. 8029/59 C.S , dated 21st June, 1960, and quash the said order.

G Ramaswamy, for Appellant

The Assistant Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, C J —The writ appeal is within a limited compass, and, stated very briefly, it really involves the interpretation and application of the principle laid down by their Lordships of the Supreme Court in *State of Maharashtra* v. *B K. Takkamore*[1], to the facts of the case.

The facts are that the appellant was the holder of a licence under the Madras Foodgrains Dealers Licensing Order, 1958. Charges were framed against him for alleged infringement of the terms of the licence, and derelictions of duty in the light of obligations undertaken by the licensee There were four such charges, two of them related to possession of excess stock on physical verification, and the third charge related to transport on 21st July, 1959 of 70 bags of rice, for sale, outside the State to Kerala, without the issue of a sale bill as required by condition 5 of the

*W A No 15 of 1964 in W P No 533 of 1961 — 23rd January, 1968.

1. (1967) 2 S.C.J 705 : A.I R 1967 S C. 1353.

licence. The fourth charge related to non-delivery of a large quantity of rice towards procurement

The charges were held proved, and the writ appellant was punished, by his licence being suspended for a period of nine months This was confirmed by the District Revenue Officer, on appeal It was ultimately reduced to a period of suspension for three months by the Government The writ appellant then filed W P. No 533 of 1961 for quashing the orders in this matter, and the petition was heard by Srinivsan, J., and dismissed

It is important to note that, in the course of his Judgment dismissing the writ petition, the learned Judge appears to have come to the conclusion that the fourth charge was totally baseless, and that charges 1 and 2 also could not be held substantiated But the learned Judge agreed with the Departmental Authorities in holding that charge 3 was entirely proved It is seen by us from the record that, with regard to charge 3, the licensee attempted to put forward a factual explanation concerning that state of the transported grain, and his failure to issue the sale bill, which he was unable to substantiate. Hence, since charge 3 alone remained as a proved charge, the learned Judge had necessarily to address himself to the question whether the punishment ultimately imposed could be sustained, or should be interfered with in writ jurisdiction The learned Judge referred to the dicta of the Supreme Court in *State of Orissa* v *Bidyabushan*[1], and, after a detailed discussion, came to the conclusion that the infringement of condition 5 of the licence, namely, charge 3, could relate to, and justify, the actual penalty imposed in the case, notwithstanding that the other charges had failed This is the one point stressed before us by learned Counsel for the writ petitioner Mr. Ramaswami.

We may notice that the judgment of the Supreme Court in *State of Orissa* v. *Bidyabhushan*[1], has been discussed in *State of Maharashtra* v. *Takkamore*[2], and reference has also been made to other available precedents on this particular principle. In *State of Orissa* v *Bidyabhushan*[1], the principle was stated in the form that, where certain of the charges are found to be non-existent or vitiated by a total absence of proof, and only some of the charges or a single charge can be held to survive, the question is whether the order may nevertheless " be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed " In the latest decision, that passage has again been set forth, and the principle is enunciated in the form that, even if certain of the grounds are found to be non-existent or irrelevant, the order can be sustained, if the Court is satisfied " that the authority would have passed the order on the basis of the other relevant and existing grounds "

Obviously, this is a question of the actual facts, and the extent to which a reasonable nexus can be established, between the surviving charge or charges, and the punishment imposed. In the present case, one charge definitely did survive, and has been held to be proved by all the authorities below and by the learned Judge. In a sense, it may be characterised as technical, but, nevertheless, it is a charge of some significance, for the reason that it relates to an infringement of an important term of the license, and the explanation sought to be put forward by the licensee for this infringement, was never substantiated. Obviously, to test the reasonableness of the connection between the surviving charge and the order, the penalty has to be scrutinised In this case, it is penalty of deprivation of rights under the licence, for a period of three months The Authorities could very well have imposed that penalty, even if this had been the only charge, and might well have done so without rendering themselves liable to any averment of excessive harshness Hence, on the criterion as stated by their Lordships, and applying it to the facts of this case, we do not think that there is room for interference in writ jurisdiction

The writ appeal has accordingly to be dismissed. But we must make it clear that, in our view, since the Authorities were content to impose only a suspension for a limited period of three months, even at a stage when the other charges were

1. A I.R. 1963 S C. 779.

2. (1967) 2 S.C J. 705: A.I.R 1967 S C. 1353.

considered relevant and established, equitable considerations do seem to require a review of the actual quantum of punishment, at the present stage Certainly, for the proved charge, suspension of the licence would be a proper punishment But the Authorities may consider whether the period of suspension ought not to be substantially reduced, since the three other charges were found by the learned Judge, to be not at all supported by evidence.

With these observations, the writ appeal is dismissed. No costs

V K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI

Vathsala ... *Petitioner**

v

N. Manoharan ... *Respondent*

*Husband and wife—Marriage—*Ex parte *decree of nullity of marriage—Respondent filing an application to set aside the* ex parte *decree—Petitioner contracting a second marriage relying upon the decree of nullity of marriage—Respondent's application, if becomes infructuous*

When an order of nullity of marriage is made and the law allows an appeal as well as an application to set aside an *ex parte* order and actually those remedies have been resorted to, any act of the parties as for instance, the petitioner contracting a second marriage pending final disposal of those remedies availed of cannot have the effect of rendering them infructuous Where such remedies are provided from an order, the order should be subject to the result of the application to set aside the *ex parte* order or the result in the appeal

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Pudukkottai dated 30th November, 1966 and made in I A No 64 of 1966 in O P. No. 6 of 1965

K Gopalachari, for Petitioner

N Srivatsamani, for Respondent

The Court made the following

ORDER —This is rather a peculiar case. The petitioner instituted an Original Petition for a declaration that her marriage with the respondent in this Court was a nullity because of his impotency. A decree for nullity was eventually granted, but *ex parte* The petitioner and her father had given evidence and there was also the report of the medical examination of the respondent That was the basis on which the *ex parte* decree was made The respondent filed an application to set aside the *ex parte* decree, and at the same time, also filed an appeal from the order The appeal has been withdrawn But the Court below has set aside the *ex parte* decree, it being of opinion that sufficient cause for the absence of the respondent was made out In the meantime, relying upon the decree declaring the marriage to be a nullity, the petitioner contracted a second marriage The petitioner pressed before the Court below that the respondent's application for setting aside the *ex parte* decree became for that reason infructuous. The Court below declined to accept that view

In my view the Court below was right. But learned Counsel for the petitioner refers me to *Mohanmurari* v *Kusumkumari*[1], and contends that at the time the second marriage was contracted, the decree for nullity was in force and therefore it was a valid marriage He says if that be so, the pendency of the application to set aside the *ex parte* decree could not invalidate it and adds that if the respondent wanted to prevent the second marriage, he should have applied to the Court below for a prohibitory order against the petitioner and that having not been done, the appli-

*C R P No 51 of 1967 16th February, 1968.

1. A.I.R. 1965 M.P. 194.

cation for setting aside the *ex parte* decree should have been dismissed. It is true that the decision relied upon by the petitioner goes a long way to support her But, with great respect, I am unable to concur in that view. What appears to me is that when an order of nullity of marriage is made and the law allows an appeal as well as an application to set aside an *ex parte* order and actually those remedies have been resorted to, any act of the parties pending final disposal of those remedies availed of cannot have the effect of rendering them infructuous, so to speak Where such remedies are provided from an order, the order should be taken to be valid and in force, but only subject to the result of the application to set aside the *ex parte* order or the result in the appeal To hold otherwise would mean that by an act of the party, he can successfully defeat the lawful remedy accorded to the aggrieved person. It is true the filing or pendency of an application to set aside an *ex parte* decree or an appeal does not work as an automatic reversal of the order But once an application is allowed and the *ex parte* order is set aside, the order passed in such an application reopens the trial, or if the appeal is allowed, the order made in the appeal should be taken to be the order that should have been passed at the trial. That is the principle of *Chandra Mohini Srivatsava* v *Avinash Prasad Srivatsava*[1]. The principle laid down in that decision has general application. The Supreme Court pointed out that on dissolution of marriage, a spouse can lawfully marry only when there is no right of appeal against the decree dissolving the marriage or if there is a right of appeal, the time for filing of an appeal has expired or the appeal presented has been dismissed

The petition is dismissed No costs.

V M.K ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE N KRISHNASWAMI REDDY

Anjali Devi . *Petitioner**

Madras Prohibition Act (X of 1937), *section* 4 (i) (j)—*Revision petitioner found in the company of persons who consumed liquor—Petitioner denying consumption of alcohol—Smell and external symptoms found on the petitioner, if sufficient to find the petitioner guilty*

Because a woman keeps company with persons who consumed liquor with the bottles and other materials by their side, it cannot be said that she must also have consumed alcohol It is possible that an inference that she also drank liquor may possibly be drawn, but, however, such inference cannot be irresistible. The symptons found by P W 1 on the revision petitioner by themselves are not sufficient to conclude that the petitioner had consumed brandy She denied even before P W 1 that she had consumed brandy, when two others had admitted before him In view of the denial of the revision petitioner, P W 1 should have necessarily made scientific tests instead of depending upon the mere smell. She will be entitled to the benefit of doubt.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sixth Presidency Magistrate, Saidapet, Madras, dated 20th December, 1967 in C C No. 7553 of 1967.

S Govindaswaminathan for *M Narayanamurthi* and *Ranjit Jacob,* for Petitioner.

The Assistant Public Prosecutor, for State

The Court made the following

ORDER —The revision petitioner Anjali Devi, a cine actress has been convicted under section 4 (1) (j) of the Madras Prohibition Act and sentenced to imprisonment till the rising of Court with a fine of Rs 25 and in default of payment of fine

1 (1967) 1 S C R 864 A I R 1967 S C 581

*Cr R C No 194 of 1968 18th March, 1968.
Cr R. P No 190 of 1968

to undergo simple imprisonment for one week by the Sixth Presidency Magistrate, Madras

The revision petitioner along with two others, Anjaneyalu and Kumma Reddi, were found inside a car, parked at the junction of the Mullikuppam Road and the South Beach Road, with a bottle of 'Haywards' Brandy and a bottle of 'Vat 69' Whisky, at about 11-45 P.M on 19th September, 1967 Anjaneyalu pleaded guilty in respect of the charges framed against him whereas the revision petitioner as accused-2 and Kumma Reddi as accused-1 who had been tried together were convicted under section 4 (1) (*j*) Accused-1 Kumma Reddi admitted that he consumed brandy but denied possession of liquor bottles The revision petitioner denied possession as well as consumption of liquor.

The brief facts of the prosecution case are these: P.W. 2-Dhanaraj, Inspector of Police, Vigilance, Madras, on information proceeded to Mullikuppam Road, Oceanic Hotel at about 11-45 P.M on 19th September, 1967, and found the car APU 8355 parked on the Mullikuppam Road. Kumma Reddi was found seated in the driver's seat. Behind him, on the rear seat, the revision petitioner and Anjaneyalu were seated By the side of Kumam Reddi, on the front seat, there was a green coloured box (M.O.1) in which, 'Haywards' Brandy bottle (M O 2) containing 12 ounces, a bottle containing about 6 ounces of 'Vat 69' Whisky (M O 3), an empty glass tumbler (M O. 4) and five empty soda water bottles (M O. 5 series) were found P W. 2 arrested all the three persons and seized M Os. 1 to 5 At about 1-30 A M. the same night, P W. 1 Dr. Ramachandran, casualty Medical Officer, Government Royapettah Hospital, Madras, examined Kumma Reddi and the revision petitioner Kumma Reddi admitted before P W. 1 that he had consumed brandy, but the revision petitioner denied having consumed alcohol. P.W 1 found the following symptoms on the revision petitioner

> "Her eyes were congested, pupils dilated and not reacting to light and her breath was smelling of brandy"

He was of the opinion that she had consumed brandy but not under its influence

The revision petitioner in the Court admitted that she was in the company of the other two persons but denied that she had consumed brandy

It admits of no doubt that the symptoms found by P.W. 1 on the revision petitioner would not suffice to infer that she had consumed brandy. As a matter of fact, the learned Magistrate himself, following the decisions of our High Court and the Supreme Court found that the external symptoms by themselves were not conclusive of the fact of consumption of a prohibited variety of alcohol But he was persuaded by the fact that she was found in the company of two others who admittedly consumed brandy in the car and that bottles of whisky and brandy were found in the same car and that, therefore the revision petitioner could be reasonably inferred to have consumed brandy. He has also taken into consideration that the revision petitioner had not stated that she had taken any medicinal preparation containing a fair percentage of alcohol which might have stimulated the symptoms found on her. That he was clearly persuaded by this circumstance can be seen from the observation made by him in his judgment in the following emphatic terms

> "But, unlike in these reported cases we have the significant and clinching circumstance that a bottle of brandy and a bottle of whisky (M O. 2 and M O. 3) had been found by their side in the same car at the time of the arrest of A-1, A-2 and D.W. 1 There is also the further circumstance that A-1 and D W. 1 on their own showing, had also consumed brandy and whisky respectively out of M O. 2 and M O. 3 at the time. These circumstances, would cumulatively, lead but to the one irresistible inference that A-2 also had consumed either brandy out of M O. 2 or whisky out of M O 3, it is immaterial which"

It is possible that an inference of this kind may possibly be drawn; but, however, such inference cannot be irresistible. Because a woman keeps company with persons who consumed liquor with the bottles and other materials by their side,

it cannot be said that she must also have consumed alcohol The symptoms found by P W 1 on the revision petitioner by themselves are not sufficient to conclude that the petitioner had consumed brandy. The additional circumsantce that the revision petitioner was found in company with the other two persons with the liquor bottles by their side could not, in my view, even cumulatively lead to an irresistible inference as observed by the learned Magistrate, that she must have consumed liquor.

It will be significant to note that only one glass tumbler was seized Normally it could be expected that if three people were drinking, there would be at least three tumblers It is not the case of P W 2 that he saw the revision petitioner and two others actually consuming the liquor.

The revision petitioner has taken a consistent stand that she has not consumed liquor She denied even before P W. 1 that she had consumed brandy, when two others had admitted it before him. In view of the denial of the revision petitioner, P W 1 should have necessarily made scientific tests instead of depending upon the mere smell. He could have taken the blood and urine of the petitioner for analysis to ascertain the presence of alcohol The Supreme Court in *State of Andhra Pradesh Madiga Boosenna*[1], observed that merely trusting to the smelling sense of the prohibition officers, and basing a conviction on an opinion expressed by those officers under the circumstances, cannot justify the conviction of the accused and that better proof, by a technical person, who has considered the matter from a scientific point of view, is not only desirable but even necessary

Taking an all round view of the case, I am of the opinion that the evidence let in by the prosecution is not sufficient to hold conclusively that the revision petitioner consumed prohibited alcohol She will be entitled to the benefit of doubt.

The revision case is allowed and the petitioner is acquitted Fine if paid, will be refunded to her.

V.M K. —— *Revision case allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Natesa Pillai .. *Appellant**

v.

Koneri Naicker and another *Respondents.*

Limitation Act (IX of 1908), Articles 28 and 36—Applicability of—Plaintiff alleging that he was not liable for the kist and that there was illegal distraint for recovering the same—Limitation—Starting point—Proper Article—Applicability of.

The complaint of plaintiff being that the kist was not payable for the particular fasli year by him and that it was payable only by Thanji Ammal and that the 1st defendant illegally distrained his two bulls for recovering the kist from him, Article 28, being specified in relation to the cause of action of the plaintiff, applies.

Held on facts the suit is barred.

Appeal against te Decree of the Court of the Subordinate Judge, Vellore, in Appeal Suit No 86 of 1963, preferred against the Decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No 264 of 1961.

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1 (1967) L W (Cr) 103 (1968) M L J (Crl) 57. (1968) 1 An W R (S C) 57 : A.I R 1967 12. (1968) 1 S C J 160. (1968) 1 M L J (S C) S C 1550

* S A No 522 of 1964. 18th March, 1968.

T R. Ramachandran and *K. Chandramouli*, for Appellant.

N Sivamani and M. V Krishnan, for Respondent No. 1.

Government Pleader, for Respondent No. 2.

The Court delivered the following

JUDGMENT —The lands covered by Patta No. 55 in Naraiyaur Village in Tiruvannamalai Taluk belonged to one Thanji Ammal She mortgaged the same to the plaintiff for Rs 700 On that mortgage, the plaintiff filed O S No 7 of 1956 on the file of the Court of the District Munsif of Tiruvannamalai and got a decree, executed it and himself purchased the property in Court auction The sale was confirmed on 9th February, 1959, and the plaintiff obtained delivery of possession on 6th March, 1960 On 12th June, 1959, the first defendant, Village Munsif of Naraiyur Village suddenly went to the plaintiff's house and demanded Rs 9-75 as kist for fasli 1368, in respect of lands covered by Patta No 55 and served a distraint order The plaintiff represented that he was not liable to pay and that only Thanji Ammal was liable to pay. The first defendant thereupon attached two bulls belonging to the plaintiff In view of that, the plaintiff paid the sum of Rs 9-75 to the first defendant under protest and got the bulls released Thereafter on 25th February, 1961, the plaintiff instituted O S No 264 of 1961 on the file of the Court of the District Munsif of Tiruvannamalai for recovery of the said sum of Rs 9-75 from the first defendant and the State of Madras represented by the Collector of North Arcot District at Vellore, impleaded as 2nd dfendant The defendants raised several defences and the learned District Munsif framed the necessary issues arising out of the pleadings The learned District Munsif by his judgment and decree dated 1st October, 1962, held that the suit as far as the 2nd defendant (State of Madras) was concerned, was liable to be dismissed on the simple ground that the notice contemplated by section 80 of the Code of Civil Procedure was not served. Though he also came to the conclusion that the State could not be made liable for the tortious acts of its subordinates, the same was unnecessary, in view of his finding that the suit as such was not maintainable as against the State of Madras. As far as the 2nd defendant was concerned the learned District Munsif came to the conclusion that the case came under section 59 of the Madras Revenue Recovery Act and the suit was barred by limitation with reference to the provisions contained in the said section Against this judgment and decree the plaintiff preferred A S No 537 of 1962 on the file of the District Court, North Arcot District, which was transferred as A S No. 86 of 1963 on the file of the Court of the Subordinate Judge, Vellore, and was disposed of by the learned First Additional Subordinate Judge on 11th October, 1963 The learned Subordinate Judge disagreed with the conclusion of the learned District Munsif with regard to the question of limitation against the first defendant and decreed the suit of the plaintiff as againt the first defendant. Hence present second appeal by the first defendant in the suit

Mr T R Ramachandran, learned Counsel for the appellant, contends that the conclusion of the learned Subordinate Judge on the question of limitation is erroneous in law The learned Subordinate Judge has expressly found that the suit did not fall within the scope of section 59 of the Madras Revenue Recovery Act. However, it is not clear by what Article of the Limitation Act the suit was governed, in the opinion of the learned Subordinate Judge, since except referring to the argument advanced on behalf of the plaintiff that Article 36 of the Limitation Act applied, he himself had not given a finding as to which Article of the Limitation Act applied to the suit The contention of Mr. Ramachandran is that Article 36 has no application, but it is only Article 28 that is applicable to the suit in quesion On the other hand, Mr M V Krishnan, learned Counsel for the plaintiff contends that the suit is really governed by Article 36 of the Limitation Act, 1908 Therefore, the question for consideration before me is whether it is Article 28 or Article 36 of the Limitation Act, 1908 which applied to the suit, because, if it is Article 28 that is applicable, the suit is barred by limitation and on the other hand, if it is Article 36 that is applicable, the suit is not barred by limitation.

The said Articles are —

	Description of suit	*Period of Limitation.*	*Time from which period begins to run*
28	For compensation for an illegal, irregular or excessive distress	One year	The date of the distress.
36	For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specifically provided for	Two years	When the malfeasance, misfeasance or non-feasance takes place

In my opinion, the language contained in column No 1 of the said two Articles itself indicates that it is Article 28 that applies to the suit instituted by the plaintiff The facts narrated above will clearly show that the complaint of the plaintiff was that the kist was not payable for the particular fasli year in question by the plaintiff and it was payable only by Thanji Ammal and the first defendant illegally distrained his two bulls for recovering the kist from him Therefore, in my opinion, Article 28, being specific in relation to the cause of action of the plaintiff, is the Article which applied to the present suit Consequently the suit of the plaintiff which was instituted on 25th February, 1961, when the distraint was effected on 12th June, 1959, was beyond the period of limitation prescribed by Article 28 of the Limitation Act, 1908

Under these circumstances, I allow the Second Appeal, set aside the judgment and decree of the learned Subordinate Judge and restore those of the learned District Munsif. There will be no order as to costs in the Second Appeal No leave.

S V J ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE K VEERASWAMI

Srinivasamurthy Mandiram by its Managing Trustee Venkatasubbiah ... *Petitioner**

v

Vaduvambal . *Respondent.*

Civil Procedure Code (V of 1908), *section* 11—*Doctrine of* res judicata—*Scope —Applicability to order under section* 9 *of the Madras City Tenants Protection Act,* 1921.

The doctrine of *res judicata* covers an adjudication both on factual as well as legal matters That a different view of the law has been subsequently taken will not affect the applicability of the doctrine

There is nothing in the scheme of the Madras City Tenants Protection Act, 1921, which bars the application of the doctrine of *res judicata* to an order under section 9 thereof It may be that when the landlord files a second suit for ejectment, the tenant would have the right of filing an application under section 9. But the proceedings in this application would be governed by the principle of *res judicata.*

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court, Madras in I A No 106 of 1964 in O S No 2907 of 1963

V Srinivasan, for Petitioner.

N Viramani and *E. S. Raja,* for Respondent.

The Court made the following

ORDER —This petition by the landlord is directed against an order of the Fifth Assistant Judge of the City Civil Court, Madras He had filed a suit O S No 359

* C R P No 8399 of 1967 19th March, 1968

of 1960 for ejectment and to recover arrears of rent. The defendant filed an application under section 9 of the Madras City Tenants Protection Act, 1921 Both the suit and the application were dismissed The dismissal of the suit was rested on the ground of want of notice under section 11 The application under section 9 was dismissed because, in the view of the Court of the *Explanation* to section 9, the plaintiff as a trustee had no power to execute a sale in favour of the defendant except for necessity In taking that view, the Court below purported to follow *Sivananda Gramani* v *Mohammed Ismail*[1] The landlord subsequently brought O S No. 2907 of 1963 for ejectment and for recovery of arrears The tenant taking advantage of this, filed over again an application under section 9. Pending that suit, the Court below heard the application and allowed it In doing so, it was of opinion that the previous order on the earlier application under section 9 did not operate as *res judicata*. It also noted that the view expressed in *Sivananda Gramani* v. *Mohammed Ismail*[1], no longer held the field in view of *Sundareswarar Devastanam* v *Marimuthu*[2] The aggrieved landlord is before this Court in revision.

It has been held in *Vedachala Naicker* v *Doraiswami Mudaliar*[3], that having regard to the scheme of the Act, the application under section 9 is independent of the suit and can be prosecuted even if the suit is withdrawn. Section 9-A provides for an appeal from an order under section 9 The very question as to whether the plaintiff in his capacity as a trustee of the institution, which is a Bajana Madam, is entitled to sell is raised over again as between the very parties It seems to me that merely because the view on which the previous order on the earlier application under section 9 was based no longer holds the field because *Sundareswarar Devasthanam* v *Marimuthu*[2] takes a different view, it does not follow that it set the matter at large as between the parties The doctrine of *res judicata* covers an adjudication both on factual as well as legal matters That a different view of the law has been subsequently taken will not affect the applicability of the doctrine I am inclined, therefore, to think that the Court below is not right in its view that the previous order did not operate as a bar to an order on the subsequent application

It is, however, argued that the fact that a different view of the law has been taken subsequently made a difference I do not accept the contention The observation I have made earlier is an answer Neither *Annamali & Co Ltd* v *Cibgathullah Sahib*[4], nor *Ramaswami Reddi* v *Marudai Reddi*[5], in any way is of assistance to the respondent In the first of these cases, the earlier decision related to an entire block of land with buildings thereon This decision was held to be not *res judicata* on a subsequent occasion, where only a portion of the land without building thereon was in question with reference to which section 9 was invoked In such circumstances, a Division Bench of this Court held that the earlier decision did not operate as *res judicata* There is no such change of the subject matter in the present case. So too, in the second case cited, there was no final determination on the earlier occasion on the question of permanent tenancy in appeal. The order of the trial Court was confirmed in appeal only on the ground of want of notice to quit In that situation it was held that the earlier decision did not operate as *res judicata* on the subsequent occasion when the question of permanent tenancy was raised

I do not think that there is anything in the scheme of the Act, which bars the application of the doctrine of *res judicata* to an order under section 9. It may be that when the petitioner filed a second suit, the respondent would have the right of filing an application under section 9 But the proceedings in this application would be governed by the principle of *res judicata* As I said, the decision on a similar or identical point as between the same parties cannot be raised over again and the same decided, notwithstanding the fact that the earlier order was a wrong order. The petition is allowed The result of it is that the application under section 9 will stand dismissed. No costs

V K. ——— *Petition allowed.*

1. (1959) 1 M L J 263
2. I L R (1963) Mad 1054 A I R. 1963 Mad 369
3. (1950) 1 M L J 732.
4. (1955) 2 M L.J. 653: I L R. (1956) Mad. 251
5. (1924) 46 M.L J 198 · I.L R 47 Mad. 453

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M NATESAN.

The Madras District Automobile and General Employees' Union, Registered No 1383, representing the Workmen employed in M/s Sundaram Motors (P) Ltd., Madras .. *Appellant**

v.

The State of Madras represented by the Secretary, Industries, Labour, Co-operation Department, Fort St. George, Madras-9 and another .. *Respondents*

Industrial Disputes Act (*XIV of* 1947), *sections* 10 *and* 12 (5)—*Settlement between the Management and the Union representing the majority of workers—Government, if bound to decide on expediency of the reference on the same facts at the instance of minority Union.*

Where there are two unions of workers in the concerned industry, or unit of industry and one union which contains the majority of workers claims to have arrived at a settlement with the Management through negotiation in respect of the very matters in controversy, or some of them, a minority Union like the present appellant cannot urge that these facts should be altogether omitted from consideration by Government, in deciding on the expediency of the reference On the contrary, those facts would be perfectly relevant, and it would be equally relevant whether developments subsequent to the period or date when the issues in controversy were raised, may render the reference itself otiose

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Veeraswami dated 21st July, 1964 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1345 of 1962 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the first respondent to ignore the reasons contained in the order dated 24th October, 1962, and to dispose of afresh according to law, the question whether reference under section 10 read with section 12 (5) of the Industrial Disputes Act is called for in respect of items of disputes mentioned as 2 and 3 in the Order dated 24th October, 1962 bearing G O Ms No 5250 (Labour)

B. R Dolia of *M/s Aiyar* and *Dolia*, for Appellant

Government Pleader for the 1st Respondent.

A. R. Ramanathan, for 2nd Respondent

The Judgment of the Court was delivered by

Anantanarayanan, C.J—The Writ Appeal is by a Trade Union of the workmen of Messrs. Sundaram Motors (P) Ltd , from the judgment of Veeraswami, J , in W P. No 1345 of 1962, declining to issue a writ of *mandamus* to the State of Madras to dispose of the alleged dispute afresh under section 10 read with section 12 (5) of the Industrial Disputes Act It is not necessary to canvass the facts at any length It is sufficient for us to state that the points in controversy related to revision of wage scales, dearness allowance, leave facilities, bonus for 1961 and gratuity, and, lastly to the non-employment of one P Sambasivan.

A great deal of the area covered in the judgment of the learned Judge by way of discussion, may now be regarded as unnecessary. The learned Judge referred to the decisions of the Supreme Court in *State of Bombay* v *K P Krishnan and others*[1] and *Bombay Union of Journalists* v *State of Bombay*[2], and emphasised that the Government, on these authorities, would be justified in considering the *prima facie merits* of the dispute, and in taking into account other relevant data which may assist the

*W A No 382 of 1964 — 20th March, 1968.

1 (1960) 2 L L J 592 — 2 (1964) 6 S C R 22 (1964) 1 L L J. 351.

Government to decide whether a reference would be expedient or otherwise The learned Judge then came to the conclusion that the Government did not act, in this case, on anything extraneous or irrelevant, and that the Government would be justified in taking into account, in the manner that they did, the settlement reached by another Union of the Workers, namely, T V S Workers' Union, with the Management, in regard to certain aspects of the points in controversy

It is needless for us to emphasize that where there are two unions of workers in the concerned industry, or unit of industry, as in this case, and one union which contains the majority of the workers claims to have arrived at a settlement with the Management through negotiation in respect of the very matters in controversy, or some of them, a minority Union like the present appellant cannot urge that these facts should be altogether omitted from consideration by Government, in deciding on the expediency of the reference. On the contrary, those facts would be perfectly relevant, and it would be equally relevant whether developments subsequent to the period or date when the issues in controversy were raised, may render the reference itself otiose Mr Dolia for the appellant Union does concede that such developments might have taken place and hence, that, at the present moment, in view of the considerable lapse of time since the original issues in controversy were raised, it may be very difficult to state whether they are live issues, or whether they are not

We may therefore point out that the learned Judge was entirely justified in taking these facts into consideration, and in coming to the conclusion that it cannot be held, in this case, that Government acted arbitrarily or upon consideration of matters not germane to the subject, when they declined reference under sections 10 and 12 of the Act It is indisputable that our power in *mandamus* in this case, is not either to direct such a reference or to constrain the Government to do so, but only to ask the Government to re-consider the issue Again, it appears to be equally indisputable that there is no bar of limitation applicable to such cases It may be that conditions have bettered so much, that the original issues are now academic It may be that other grievances have developed, or even that they are more controversial than they were, when the Union originally agitated for their consideration It is always open to the Union to agitate for a fresh reference on conditions of employment as between the Union and the Management Accordingly, we shall leave the matter there, as far as this aspect of the writ appeal is concerned

But Mr Dolia for the Union urges that the matter is on a somewhat different footing, upon the last of the issues, namely, non-employment of P Sambasivan This was an independent dispute, at the inception, and, later, the worker became a member of this minority Union, and the Union appears to have sponsored his cause We are not now stating anything on the merits of the alleged dismissal, indeed, we cannot do so, since the Government declined to make a reference But we find that the dismissal was in September, 1960, and that it was only twelve months later, that the Union which subsequently came into existence sponsored the dispute Actually, the dismissed workman himself became a member of the Union, only subsequently This belatedness was the reason given by the Government for declining to make the reference We cannot state that that is necessarily unreasonable or perverse Further, conditions might have changed now, and it may even be that the individual workman is employed elsewhere, or is no longer desirous of returning to this unit of industry Only the Union is the appellant here, and if the workman is still in need of relief with regard to his alleged dismissal, it may be open to the Union to move the Government afresh, on the existing state of facts with regard to the worker.

With these observations, the writ appeal is dismissed The parties will bear their own costs

V M K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K S VENKATARAMAN.

T. M Narayanaswami Asari ... *Appellant**

v

The State of Madras represented by the Collector of Ramnad at Madurai and another . *Respondents*

Civil Procedure Code (V of 1908), *Order* 41, *rule* 23—*Remand of case by Appellate Court—Decree of the trial Court—If requires to be set aside—Necessity for such a finding—Practice*

The plaintiff filed the suit in respect of strip of land lying to the north of his property, and obtained the decree in the trial Court The subordinate Judge allowed the appeal filed by the defendant and dismissed the suit The High Court allowed the Second Appeal preferred by the plaintiff on the short ground that the Subordinate Judge while relying on his inspection had not made any memorandum of the inspection and made it part of the record The High Court remanded the matter for disposal The Subordinate Judge on remand, in turn, remanded the suit to the District Munsif with the observation that both parties agreed that it is necessary to fix the southern boundary and locate the suit property He also set aside the decree of the Munsif The plaintiff preferred the appeal against this order.

Held, it has been repeatedly held that before the Appellate Court can remand the suit to the trial Court under Order 41, rule 23, Civil Procedure Code, it is necessary for the Appellate Court to find that the decree of the trial Court requires to be set aside

On facts It cannot be said that the District Munsif should necessarily have proceeded to determine the question with reference to the southern boundary of the plaintiff's property especially when no request to do so had been made to him. He may have done so, but merely on that ground the Subordinate Judge is not correct in saying that his decree should be set aside It has been laid down that in such cases it is for the Appellate Court to take the additional evidence which it requires and keep the appeal on its file and dispose it of in the light of the said evidence

Appeal against the Order of the Court of the Subordinate Judge of Ramanathapuram at Madurai dated 14th February, 1966 and made in A S No 35 of 1961 (O S No 270 of 1957, District Munsif's Court, Ramanathapuram)

R Gopalaswamy Ayyangar and *R. Alagar*, for Appellant.

The Additional Government Pleader and *V Ramaswami*, for Respondent

The Court delivered the following

JUDGMENT —This appeal has been filed by the plaintiff in O S No 270 of 1957 on the file of the District Munsif of Ramanathapuram, against the order dated 14th February, 1966 of the learned Subordinate Judge of Ramanathapuram at Madurai, in A S. No 35 of 1961, setting aside the decree which the plaintiff had obtained at the hands of the learned District Munsif and remaining the suit for fresh disposal after reissuing the warrant of commission to the same Commissioner who had previously inspected the property The suit concerns a strip of land marked yellow just south of the office of the Keelakarai Panchayat Board (second defendant) and north of the property of the plaintiff The plaintiff claims it as part of his property and the Panchayat Board claims it as its The plan, Exhibit B-2, drawn by the Commissioner shows the property in dispute On a prior occasion the plaintiff had filed the suit O S No 50 of 1946 against the Panchayat Board and succeeded and he contends that that decree deals with the same property However, the

* A A O No 197 of 1966 8th April, 1968

State of Madras, who is the first defendant, claims that the strip of property was acquired in 1908 and transferred to the second defendant and the State is not bound by the decision in O S No. 50 of 1946. Hence the plaintiff instituted the suit O.S. No. 270 of 1957 impleading the State as the first defendant and the Panchayat Board as the second defendant.

The learned District Munsif in an exhaustive judgment dated 14th September, 1960, decreed the suit. One of his reasons was the non-production by the Government of the relevant records in the acquisition of 1908. The first defendant preferred the appeal A S No 35 of 1961, which came up before the learned Subordinate Judge, Sri S Kumaraswami Pillai He *inter alia* inspected thes uit property and after considering the materials on record, allowed the appeal and dismissed the suit. Against that, the plaintiff preferred S A No 551 of 1962 to this Court Kailsasam, J., allowed the Second Appeal on the short ground that the learned Subordinate Judge, while relying on his inspection, had not made any memorandum of the inspection and made it part of the record as required by Order 18, rule 18, Civil Procedure Code He, therefore, said " the Subordinate Judge of Ramanathapuram at Madurai, will dispose of the appeal without the plan or notes of inspection by the Judge. If the Appellate Judge feels a spot inspection is necessary he may do so "

Thereafter, the matter came up before another learned Subordinate Judge Sri C. Ganapathyappan. The learned Judge did not make any inspection and did not discuss the evidence on the basis of which the learned District Munsif had decreed the suit But remanded the suit to the learned District Munsif on a short ground which is this The plaintiff claimed that his property was north of the houses of Sudalaimuthu Asari and Poolan Asari and that his property measures 77 feet north to south on the eastern side and 72 feet north to south on the western side. That is described as Item 1 in the plaint schedule itself The learned Subordinate Judge felt that one of the tests for determining to whom the suit property (the alleged encroachment) belonged would be to lay the northern boundary of the houses of Sudalaimuthu Asari and Poolan Asari and then lay out 72 feet on the north of it on the western side and 77 feet on the north of it on the eastern side If that was done, it could be seen whether the alleged encroachment fell within the plaintiff's property or not The learned Subordinate Judge has further observed

> " Both parties agreed that it is necessary to fix the sourthern boundary and locate the suit property Under these circumstances I think it just and necessary, that the suit should be remanded to the trial Court which shall re-issue the warrant to the same Commissioner who shall fix the southern boundary of the suit property as described in the plaint schedule and thereafter fix the northern boundary of the suit property so as to ascertain whether it includes the yellow shade portion, that is the subject-matter of the suit The plaintiff shall bear the costs of the Commission For these reasons this appeal has to be allowed The decree and judgment of the learned District Munsif are set aside and the suit is remanded to the trial Court . ... "

It is against this order of remand dated 14th February, 1966, that the plaintiff has preferred this appeal Sri R Gopalaswamy Iyengar and Sri R Alagar appearing for the plaintiff-appellant do not take any serious objection to the direction of the learned Subordinate Judge that the southern boundary of the plaintiff's property may be fixed with reference to the houses of Sudalaimuthu Asari and Poolan Asari and that a Commissioner may lay off 77 feet on the eastern side and 72 feet on the western side But they urge that that would not justify the setting aside of the decree of the learned District Munsif and that the learned Subordinate Judge may keep the appeal on his file and deal with the entire evidence including the additional evidence which may become available after the re-issue of the Commission. The contention of the learned Counsel is obviously correct This Court has repeatedly held that before the appellate Court can remand that suit to the trial Court, under Order 41, rule 23, Civil Procedure Code, it is necessary for the appellate Court to find that the trial Court's decree requires to be set aside It cannot be said that

the learned District Munsif should necessarily have proceeded to determine the question with reference to the southern boundary of the plaintiff's property especially when no request to do so had been made to him He may have done so, but merely on that ground, the learned Sub-Judge is not correct in saying that his decree should be set aside. In such cases, the decisions of this Court lay down that it is for the appellate Court to take the additional evidence which it requires and keep the appeal on its file and dispose it of in the light of the said evidence (See the decisions in *Ramakrishna* v *Rangayya*[1], *Ahamed Rowther* v *Bathumal Beevi*[2], *Balasubramania* v. *Subbiah*[3], and my decision in *Chinnan Ambalam* v *Ramiah Maniam and others*[4], *Achammal and another* v. *Kistama Naidu*[5].

The order of the learned Subordinate Judge dated 14th February, 1966 is accordingly set aside and he is directed to keep the appeal on his file and dispose it of according to law and in the light of the observations contained in this Judgment and the judgment of Kailasam, J, dated 1st September, 1965 in S A. No. 551 of 1962. The parties will bear their own costs in the appeal. No leave.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI

V. Syed Hanifa .. *Petitioner**

v

Muhammad Khalifulla *Respondent.*

Civil Procedure Code (V of 1908), section 115—Order made by Rent Controller holding that he was competent to act under section 476, Criminal Procedure Code—If subject to revision under section 115, Civil Procedure Code.

An order of the Rent Controller holding that he was competent to act under section 476, Criminal Procedure Code and lay a complaint is not subject to revision by the High Court under section 115, Civil Procedure Code as the Rent Controller is not a civil Court.

Query Rent Controller if a ' Court '

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Rent Controller, Tiruchirapalli, in O.P. No. 101 of 1966.

K Ramaswami, for Petitioner.

K Sarvabhauman, for Respondent.

The Court made the following

ORDER —This is a petition to revise the order of the Rent Controller, Tiruchirapalli, holding that he was competent to act under section 476, Criminal Procedure Code, and lay a complaint against the petitioner for offences under sections 465 and 471, Indian Penal Code

It should be made clear that the Rent Controller was only deciding the question of his competency to lay a complaint and he had not decided whether it was necessary in the interests of justice to lay such a complaint That question still remains open

On behalf of the petitioner it is contended that the Rent Controller is not a civil, criminal or revenue Court, which under section 476, Criminal Procedure Code, is competent to lay a complaint in respect of any offences referred to in section 195 (1) (*b*) or (*c*), Criminal Procedure Code The criteria for deciding what is 'a Court' has been succinctly set forth in the decision of the Supreme Court in *Kumar* v. *State of Punjab*[6], in para 6 —

1 A I R 1954 Mad 783
2 (1960) 1 M L J 37
3 I L R (1964) 2 Mad 586 : 78 L W 105.
4 A A O No 369 dated 22nd June, 1967.
5 A A O No 88 of 1964 dated 23rd June, 1967
6 (1956) S C J 138 (1955) 2 S C R. 1013 : A.I R 1956 S C 153.

*C. R P. No 460 of 1968. 18th June, 1968.

" . It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definite judgment To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court "

Applying these principles there is no doubt that the Rent Controller would be a 'Court' He decides disputes in a judicial manner and declares rights of parties in a definitive judgment. Parties are entitled as a mater of right to be heard in respect of their claim and adduce evidence in proof of it He has to decide the matter on a consideration of the evidence adduced and in accordance with law In all matters before the Rent Controller there is a '*lis*' in which persons with opposing claims are entitled to have their rights adjudicated in a judicial manner. The enquiry is not entrusted to an *ad hoc* tribunal Applying all these tests it would appear that the Rent Controller is not a civil, criminal or revenue Court A learned single Judge of the East Punjab High Court in *Tarachand* v *State*[1], held that neither the Rent Controller nor the appellate authority under the East Punjab Urban Rent Restriction Act is a Court and therefore they cannot be held to be civil Courts within the meaning of section 476, Criminal Procedure Code For this purpose the learned Judge relied upon the decision of the Supreme Court referred to earlier. The learned Judge mentions that the Supreme Court placed reliance principally on a decision of a Full Bench of the East Punjab High Court in *Pitman's Shorthand Academy* v *Lilaram & Sons*[2] But in the Supreme Court decision, there is no reference to this decision of the Full Bench of the East Punjab High Court The decision of the Full Bench the Punjab High Court in *Pitman's Shorthand Academy* v. *Lilaram Sons*[2], held that the Rent Controller and appellate authority appointed under the East Punjab Rent Restriction Act of 1947 do not constitute civil Courts subordinate to the appellate jurisdiction of the High Court and therefore their orders are not subject to revision by the High Court under section 115, Civil Procedure Code While there may be room for argument as to whether the Rent Controller is or is not a Court there can be no doubt that the Rent Controller is not a civil Court, subordinate to the appellate jurisdiction of the High Court The Full Bench of the East Punjab High Court did not decide the question whether the Rent Controller was a Court, it only held that he was not a civil Court With respect, that decision is undoubtedly correct In this case the decision of the Rent Controller is not subject to revision by this Court under section 115, Civil Procedure Code, as the Rent Controller is not a civil Court This is enough to dispose of this revision petition It has got to be simply dismissed on the ground that the decision of the Rent Controller not being one by a civil Court is not open to revision under section 115, Civil Procedure Code, by this Court The civil revision petition is accordingly dismissed

The dismissal of the revision petition does not of course dispose of the question which the Magistrate might have to decide, *i e*, whether the offences complained of before him are offences in relation to a Court as required under section 476, Criminal Procedure Code.

V K. *Petition dismissed.*

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1 A I R 1962 Punj 555 2 A I R 1950 E.P 181.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE A ALAGIRISWAMI

Mohamed Sali ... *Appellant* *

v.

Siluvai Arikkanjir Fernande (died) and others ... *Respondents.*

Limitation Act (IX of 1908), section 14—Two Courts having jurisdiction in respect of a claim—Plaintiff filing suit in one of them on the last date of limitation—On defendant's objection as to jurisdiction, plaintiff taking return of the plaint for presentation to the other Court, by endorsing—Re-presentation to the other Court after some time after taking return of the plaint—Whether barred by limitation—Whether suit deemed to be pending in the first Court till re-presented to the other Court.

The parties cannot by consent confer jurisdiction on a Court which did not have jurisdiction Similarly, parties cannot by consent take away the jurisdiction of a Court It is open to them to agree that of two Courts having jurisdiction the suit should be instituted only in one of them The present case can even be brought under that rule It cannot, in any case, be said that, either because the plaintiff wanted the plaint to be returned to him for re-presentation to the proper Court or because of the order of the learned District Munsif of Tuticorin returning the plaint, consequent of that request, the plaintiff is debarred from contending that the Court of the District Munsif, Tuticorin, had jurisdiction, especially for deciding the question whether the suit is within time The wrong order of the learned District Munsif, Tuticorin returning the plaint cannot, therefore, be *res judicata* even for the purpose of deciding the question of limitation

It is a well-known proposition of law that a wrong order of the Court cannot act to the prejudice of litigants Therefore, the wrong order of the District Munsif, Tuticorin, returning the plaint for presentation to the proper Court, cannot be held to prejudice the plaintiff in this case The suit should be deemed to be pending throughout in the right Court whether it be the Court of the District Munsif, Tuticorin or the Court of the District Munsif, Nagercoil

Held, the suit is not barred by limitation.

Appeal against the Decree of the District Court, Kanyakumari at Nagercoil in Appeal Suit No 11 of 1964 preferred against the decree of the Court of the Second Additional District Munsif of Nagercoil in Original Suit No 399 of 1959

S V Rama Iyer, for Appellant

K C Jacob, *S K L Ratan* and *M S Cardoza*, for Respondents

The Court delivered the following

JUDGMENT —The defendant is the appellant The question that arises in this case is one of limitation The defendant executed the suit promissory note on 22nd July, 1955 The suit was filed originally in the Court of the District Munsif, Tuticorin on 22nd July, 1958, that is, on the last day of limitation The defendant contended that that Court had no jurisdiction to try the suit Thereupon, the plaintiff endorsed on the back of the plaint that the plaint may be returned to him for presentation to the Court at Nagercoil where the defendant resides As a result of the endorsement, the plaint was returned on 6th August, 1959, and it was re-presented in the Court of the District Munsif, Nagercoil, on 19th August, 1959 The trial Court dismissed the suit holding that the suit was barred by limitation The lower appellate Court has allowed the appeal and decreed the suit

It is not disputed that the period during which the suit was pending in the District Munsif's Court, Tuticorin as well as the period, between the day when the District Munsif, Tuticorin, ordered the return of the plaint for presentation to the

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* S A No. 795 of 1964. 9th July, 1968

proper Court and 6th August, 1959, the day on which the plaint was taken return of by the plaintiff's Advocate is properly deductible for the purpose of computing the period of limitation But it is contended that the period between 6th August, 1959 the day on which the plaintiff's Advocate took return of the plaint and 19th August, 1959 the day on which the plaint was re-presented to the District Munsiff's Court at Nagercoil, cannot be so deducted and that the plaintiff's suit is, therefore, barred by limitation The Courts below have found that the promissory note was executed at Tuticorin and that means that the suit was properly instituted in the Court of District Munsif, Tuticorin, in the first instance

On behalf of the respondent, the contention is that the return of the plaint for re-presentation to the District Munsif's Court Nagercoil, was wrong and the suit should be deemed to be pending in the Tuticorin Munsif's Court till the plaint was re-presented to the Court at Nagercoil This is a peculiar case where both the Courts have got jurisdiction to try the suit But it is urged on behalf of the appellant that the order of the learned District Munsif of Tuticorin returning the plaint for presentation to the proper Court, even if wrong, is *res judicata* and the respondent cannot now raise the question that that order was wrong and that, therefore, the suit should be deemed to be pending in the District Munsif's Court, Tuticorin The first point to note is that there was no decision as such by the District Munsif, Tuticorin, that he had no jurisdiction to try the suit. It was only on the plaintiff saying that the plaint may be returned to him for re-presentation to the Court of the District Munsif, Nagercoil, within whose jurisdiction the defendant resides, that the plaint was returned Moreover we are not now deciding that the Court at Tuticorin had jurisdiction contrary to the earlier finding of that Court to the contrary for the purpose of deciding whether the decree has been passed by a Court having jurisdiction or not It is only to enable us to decide whether the suit should be deemed pending in the Court of the District Munsif, Tuticorin that we have to decide whether that Court had jurisdiction to entertain the suit There is no doubt that the Court of District Munsif, Tuticorin, did have the jurisdiction to entertain the suit The wrong order of the learned District Munsif, Tuticorin returning the plaint, cannot, therefore, be *res judicata* even for the purpose of deciding the question of limitation. We cannot consider whether the Court of the District Munsif, Tuticorin had jurisdiction or not On the very question of jurisdiction itself, possibly, the decision of the learned District Munsif, Tuticorin, may be *res judicata* But for the purpose of deciding the question of limitation and for deciding the question that arises incidentally for the purpose of deciding the question of limitation, it cannot be said that the decision of the learned District Munsif, Tuticorin, is *res judicata*; nor can it be said that the plaintiff is estopped from contending that the Court of the District Munsif, Tuticorin, had jurisdiction The parties cannot by consent confer jurisdiction on a Court which did not have jurisdiction *Ledgard* v *Bull*[1]. Similarly, parties cannot by consent take away the jurisdiction of a Court It is open to them to agree that of two Courts having jurisdiction the suit should be instituted only in one of them. The present case can even be brought under that rule It cannot, in any case, be said that, either because the plaintiff wanted the plaint to be returned to him for re-presentation to the proper Court or because of the order of the learned District Munsif of Tuticorin returning the plaint, consequent on that request, the plaintiff is debarred from contending that the Court of the District Munsif, Tuticorin, had jurisdiction, especially for deciding the question whether the suit is within time Therefore, the decision of the Supreme Court in *Mohanlal* v *Benoy Kishana*[2], cannot apply to this case There is no doubt as held in that case that even an erroneous decision on a question of law operates as *res judicata* between the parties to it and that the correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata* But here there was no decision on a question of law. The decision in *Chandrayya* v *Seethanna*[3], is not relevant for the purpose of this case because there the suit was filed

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1. (1885-86) 13 I A 134 (P C)
2. (1953) S C J 130 (1953) S C R 377 : (1953) 1 M L J. 449 : A I R. 1953 S.C. 65.
3. (1940) 1 M L.J 590 A I R 1940 Mad. 689

in the first instance in a Court which had no jurisdiction. The decision in *Ramdutt* v. *E. D Sassoon & Co.*[1], that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical, does not apply to this case either So also the decision in *Seshagiri Row* v. *Velayudan Pillai*[2].

The lower appellate Court was undoubtedly right in relying upon the decision in *Nandal* v *Mt Baratan*[3], In that case the suit was first instituted in the Court of the First Munsif That Munsif ordered the return of the plaint on 21st April, 1952. The pleader for the plaintiff took return of it on 23rd April, 1953 and it was re-filed in the Court of the Second Munsif on 23rd April, 1953 itself The only question that was decided in that case was that the gap of two days during which the plaint had remained in the custody of the lawyer for the plaintiff did not have the effect as if the suit which the plaintiff had originally filed in the Court of the First Munsif had terminated and a fresh suit had been filed when the plaint was presented in the other Court two days after its return In the present case it is not disputed that the time taken, between the date of the order of the District Munsif of Tuticorin returning the plaint for re-presentation to the proper Court on 28th July, 1959 and 6th August, 1959 on which day the plaintiff's pleader took a return of it, is deductable for the purpose of computing the limitation. But in discussing this question the learned Judge held as follows :

> " But as I have already observed above, having regard to the position that in law the plaintiffs must be held to have rightly filed the plaint originally in the right Court which had full jurisdiction to try it, the plaintiffs cannot be prejudiced by any subsequent illegal order of the Munsif in returning the plaint for re-filing it in another Court. It is true that the plaintiffs did not raise any objection to this order of the learned Munsif and their lawyer actually received back the plaint and re-filed it, but these facts, in my opinion, cannot alter the position that the suit must be deemed to have been filed within time in the right Court I also think that in the circumstances of the case it shall be deemed that the suit had remained pending throughout."

It is a well-known proposition of law that a wrong order of the Court cannot act to the prejudice of litigants Therefore, the wrong order of the District Munsif, Tuticorin, returning the plaint for presentation to the proper Court cannot be held to prejudice the plaintiff in this case The suit should be deemed to be pending throughout in the right Court whether it be the Court of the District Munsif, Tuticorin or the Court of the District Munsif, Nagercoil The suit is not, therefore, barred by limitation. There are no merits in this Second Appeal and it is, accordingly, dismissed with costs.

Leave granted.

S V J *Appeal dismissed*

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1 (1929) 56 M L J 614 · 56 I.A 128 : A I R. 1929 P C. 103.

2 (1912) 22 M L J 377 I L R 36 Mad 482.

3 A.I R 1960 Pat. 82.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE P. RAMAKRISHNAN

Ama Stores represented by its partner M T.M. Abubacker .. *Petitioner**

v.

The Collector of Madras, Madras-1 and another .. *Respondents.*

Stamp Act (II of 1899), section 56 (1) and (2)—Chief Controlling Revenue Authority, Board of Revenue—Deed styled agreement—Collector—Levying stamp duty on document as sale—Imposition of penalty—Aggrieved party invoking power of Board of Revenue having control over decision of Collector—Appeal petition with a request for a personal hearing—Quasi-judicial function—Obligation to give a personal hearing—Principles of natural justice—Writ

The Registrar of Trade Marks before whom the petitioner produced a document stamped as an agreement, for the purpose of transferring the trade mark, was of the opinion that the document in question was really a sale deed and sent it to the Collector of Madras for impounding. The Collector construed the document as a sale and held a sum of Rs. 1,460-25 should be paid as stamp duty and Rs 250 as penalty Aggrieved against this decision, the petitioner filed an appeal to the Board of Revenue invoking the powers conferred under section 56 (1) of the Stamp Act and requiring a personal hearing. The Board of Revenue, without giving a personal hearing to the petitioner, sustained the order of the Collector and dismissed the appeal Hence the writ under Article 226 of the Constitution

Held. The Chief Controlling Revenue Authority (the Board of Revenue) in the exercise of the quasi-judicial functions under section 56 (1) of the Act, ought to have given the petitioner a personal hearing in the disposal of the appeal

Section 56 (1) of the Act does not mention specifically about any right of appeal or revision to the aggrieved party, yet it vests in the Chief Controlling Revenue Authority a power of control over the decision of the Collector and this power under section 56 (1) is a quasi-judicial power which could be invoked at the instance of the aggrieved party.

Under section 56 (2) the Chief Controlling Revenue Authority is moved to act by the Collector before he takes a decision, while under section 56 (1) he is moved to act by the aggrieved party after the Collector has taken a decision.

In the instant case the Chief Controlling Revenue Authority has taken up the application of the party as an " appeal " against the orders of the Collector It has written out an elaborate order canvassing the grounds set out by the party in his ' petition of appeal ' What was exercised by the Authority was not an administrative function but a quasi-judicial function invoked for the purpose of modifying the orders of the Collector The duty to act quasi-judicially carries with it an obligation to give an opportunity to the party for being heard, especially when a large amount of duty and penalty is involved and where the party himself has asked for a personal hearing. The proceedings have to be quashed and further opportunity should be afforded to the aggrieved party.

Case-law discussed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records of the Second Respondent in B P. Rt No 6727/65 -L, dated 8th October, 1965 confirming the orders of the first Respondent in B2/44927063, dated 6th February, 1965 and quash the same.

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* W P No. 4369 of 1965. 29th July, 1968.

T. *Martin*, for Petitioner

J. Kanakaraj, for Government Pleader, for Respondent

The Court made the following

ORDER.—The petitioner Ama Stores, represented by its partner M.T.M. Abubacker, has filed this writ petition under Article 226 of the Constitution of India praying for the issue of writ of *certiorari* quashing respectively the orders of the Collector of Madras, the 1st Respondent, and the Commissioner of Land Revenue, Prohibition, Excise and Settlement of Estates, Board of Revenue, Madras, the 2nd Respondent The petitioner contended that a certain document executed by him on 25th October, 1963, was an agreement, which merely recited the facts of an already completed sale and also the conditions under which the sale took place Hence he pleaded that it would suffice, for the purpose of paying the appropriate Court-fee under the Stamp Manual, if the document was stamped as an agreement, for which the duty payable is Rs $2\frac{1}{4}$. This was the duty actually paid on the document, *viz*, Rs $2\frac{1}{4}$. The petitioner had to bring this agreement before the Registrar of Trade Marks for the purpose of transferring the trade mark, but that officer was of the opinion that the document in question was really a sale deed and sent it to the Collector of Madras for impounding For the levy of proper stamp duty the 1st respondent, the Collector of Madras, construed the terms of the document and came to the conclusion that it was a sale deed and not a mere agreement regarding a prior completed sale The decision of the Collector was that as a sale deed a stamp duty of Rs 1,460-25 should be levied, and in addition a penalty of Rs 250 should be paid Aggrieved against the above decision the petitioner filed an appeal to the Board of Revenue, the 2nd Respondent who as the Chief Controlling Revenue Authority, has got certain powers conferred under section 56 (2) of the Act It was this power that was invoked by the petitioner in his appeal against the order of the Collector The Board of Revenue in an elaborate order passed on 8th October, 1965, came to the conclusion that the levy of stamp duty and penalty by the Collector was proper and dismissed the appeal petition of the petitioner

It is contended by the learned Counsel for the petitioner in this writ petition and that is the main ground for the relief that he seeks that the Board of Revenue as the Chief Controlling Revenue Authority, whose appellate power the petitioner invoked, ought to have given the petitioner an opportunity for making a personal representation, especially, since in his appeal petition, he had specifically asked for that relief It is urged for the petitioner that when the Board of Revenue disposed of the appeal only on the grounds set forth by the petitioner in the appeal memo. ignoring the specific request made by the petitioner that he should be heard there was non-compliance of the principles of natural justice.

Reliance was placed by the learned Counsel for the petitioner on the decision of the Supreme Court in *Board of Revenue* v *Vidya wati*[1], and the decision of Srinivasan J, in *Annamalai & Company* v *District Registrar*[2], for the stand taken that a proper compliance with the duties imposed by the statute on the Board of Revenue as the Chief Controlling Revenue Authority in such a case should be viewed as involving a duty to hear the petitioner in person, especially when a large financial commitment would be imposed on him if his contentions are to be overruled In the Supreme Court decision cited above the matter came up before the Board of Revenue on a reference by the Collector under section 56 (2) of ther Stamp Act Such a reference is made by the Collector when without taking a decision himself he feels doubt as to the amount of duty payable. The Supreme Court held .

"The question before the Board under section 56 (2) being one of construction of an instrument and the application of the Act to it being a pure question of law which may result in payment of large amounts by the executants of the document, it would not in our opinion be improper to hold that for the determination of

1. (1963) 1 S C J 324 : A I R. 1962 S C. 1217.
2. (1965) 1 M L J. 431 : I.L.R. (1964) 2 Mad. 913 : A.I.R. 1966 Mad. 36

such a question the Legislature intended that the party affected by the decision of the Board of Revenue should be given a hearing, and that the Board should act judicially in deciding a pure question of law "

The Supreme Court also observed at page 1220 of the Judgment —

"It seems to us, considering the nature of the duty cast on the Board of Revenue under section 56 (2) requiring it to construe instruments submitted to it thereunder and the application of the Act to them which may result in payment of heavy amounts of deficit duty and even heavier amounts as penalty, that the Legislature intended that the Board of Revenue should hear the person executing the document before saddling him with large pecuniary liability."

Srinivasan, J, in the second of the decision cited above had before him a case where the District Registrar, who has got the powers of a Collector under the Stamp Act, construed a certain document and levied a stamp duty of Rs 1,138-80 The executant of the document feeling aggrieved against the District Registrar's Order moved the Board of Revenue under section 56 (1) of the Act At the same time the Inspector-General of Registration had perused the order of the District Registrar levying duty in that case, and as the matter involved some loss of revenue he referred it to the Board of Revenue under section 56 (2). Both the petitioner's appeal and the reference were dealt with by the Board of Revenue, and the appeal of the executant of the document was dismissed and the levy made by the District Registrar was confirmed Srinivasan, J., who dealt with the case in the writ petition observed:

" It is true that the authority is not required under the Madras Stamp Act to furnish his reasons for the conclusion that he reached and where the matter is put in issue and a dispute is raised and the adjudication is certainly a quasi-judicial one and imposes an onerous liability on the party, one would have expected at least brief reasons in support of the conclusions reached *More than all, as I have pointed out no opportunity whatsoever was given to the party to make his representations before any of the authorities who dealt with the matter*" (*Italics mine*).

There was a decision of this Court given much earlier in 1950 and reported in *Shanmuga Mudaliar*, In re[1] Mr P. V. Rajamannar, the learned Chief Justice, speaking for the Bench observed :

" The only ground on which this writ is sought is that the Board did not give any opportunity to the petitioner to be orally heard There is nothing in the Act or in the Rules framed thereunder which enjoins on the Board the duty to give an oral hearing to a person who invokes their revisional jurisdiction All that quasi-judicial Tribunal like the Board of Revenue have to do is to give sufficient opportunity to the persons who approach them for the exercise of their jurisdiction to state their case ... This opportunity has been given to the petitioner, because presumably he has stated all his grounds of objection to the order of the Revenue Divisional Officer in his revision petition."

The decision of the Bench of this Court was given in 1950 long prior to the decision of the Supreme Court in *Board of Revenue* v. *Vidyawati*[2] The learned Goverment Pleader, however submits that the decision of the Supreme Court will not apply to this case because that case dealt with a reference by the Collector under section 56 (2) of the Act, whereas the present case is an appeal petition by the party to the Board of Revenue under section 56 (1) In such a case it is urged that the principles laid down by the Bench of this Court in *Shanmuga Mudaliar*, In re[1] will apply I am unable to agree. Section 56 (1) does not mention specifically about any right of appeal or revision to the aggrieved party in such cases. It vests in the Chief Controlling Authority a power of control over the decision of the Collector. But both the judgment of this Court in *Shanmuga Mudaliar*, In re[1], as well as that of Srinivasan, J, in *Annamalai & Company* v. *District Registrar*[3], have construed

1. (1950) 2 M L J 399
2. (1963) 1 S C J. 324 A I.R 1962 S.C. 1217.
3 (1965) 1 M L J. 431 · I L.R (1964) 2 Mad 913.

that this power of control of the Chief Controlling Revenue Authority under section 56 (1) is a quasi-judicial power which could be invoked at the instance of the aggrieved party Section 56 (2) also vests a quasi-judicial power in the same authority, namely the Chief Controlling Revenue Authority but with this difference, that section 56 (2) is made applicable when the Collector feels himself a doubt as to the amount of duty payable on the instrument, draws up a statement of the case and refers it with his own opinion for the decision of the Chief Controlling Revenue Authority Under section 56 (2) the Chief Controlling Revenue Authority is moved to act by the Collector before he takes a decision , under section 56 (1) he is moved to act by the aggrieved party after the Collector has taken a decision But in either case the power exercised by the Chief Controlling Revenue Authority is the power of a quasi-judicial tribunal for deciding an issue between the subject on the one hand and the Revenue on the other regarding the interpretation of a document That interpretation has been held by the Supreme Court as involving a substantial question of law. The point that arose for decision by the Supreme Court is somewhat different, namely, whether on a reference by the party the Chief Controlling Revenue Authority will be obliged to make a reference to the Court under section 57 of the Stamp Act for its determination of the proper duty payable on the instrument. The Supreme Court held that the power in section 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation, and can be demanded to be exercised also by the party affected by the assessment of stamp duty. The Authority is obliged to make such a reference when an important and intricate question of law in respect of the construction of the document arises. As a public officer it is his duty to make the reference If he omits to do so, the Court can direct him to discharge the duty in an application under Article 226 of the Constitution

Srinivasan, J , in *Annamalai & Company* v *District Registrar*[1], had before him an application by the aggrieved party under section 56 (1) for collecting the levy of stamp duty and penalty by the Collector, who happened to be the District Registrar in that case. The Inspector-General of Registration, the superior Officer of the District Registrar, had also applied to the Board of Revenue for determination of the correct amount of stamp duty The decision involved the question whether the Collector had levied the proper duty, and the learned Judge observed :

> " When the Board was thus called upon to ascertain the amount of duty particularly as there had been a dispute between the petitioner and the registering authority in that regard, the decision which the Board proceeded to render would undoubtedly have been more valuable had it been given after hearing what the affected party had to say in the matter."

Then the learned Judge proceeded to examine the gist of the document and found that the result of the decision of the Board was that the party would have to pay a duty of nearly Rs 7,000 The learned Judge referred to an earlier decision of the Supreme Court in *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills*[2], but the later decision referred to above in *Board of Revenue* v *Vidyawati*[3], was not cited before the learned Judge. The learned Judge, however, observed .

> "   where the matter is put in issue and a dispute is raised and the adjudication is certainly a quasi-judicial one and imposes an onerous liability on the party, one would have expected at least brief reasons in support of the conclusion reached More than all, as I have pointed out, no opportunity whatsoever was given to the party to make his representations before any of the authorities who dealt with the matter "

It is urged by the learned Government Pleader that the Supreme Court in *Board of Revenue* v *Vidyawati*[3] proceeded on the footing that they were dealing with the matter under section 56 (2) and not under section 56 (1) " on the application

1. (1965) 1 M L J 431 I L R (1964) 2 Mad. 913
2. (1950) S C J. 444 · (1950) S.C R 536 : (1950) 2 M L J 564
3 (1963) 1 S C J 324 · A I R 1962 S C. 1217 at 1219.

filed by the respondents inviting it to exercise its power of control thereunder." The Supreme Court left the question open, as to whether the Chief Controlling Revenue Authority, whose power of control is invoked by aggrieved party, is exercising a quasi-judicial power or only an administrative power But it is difficult to hold that the scheme of the Stamp Act leaves the aggrieved party without a right of appeal especially in cases where he is ordered to pay a heavy amount of stamp duty and penalty, on the basis of the interpretation of the nature of a document for the purpose of the stamp law by a Collector, and that the only occasion when the Chief Controlling Revenue Authority is called upon to exercise quasi-judicial powers, is when the Collector who feels a doubt as to the amount of duty payable on an instrument asks for his decision under section 56 (2) On the other hand, the more reasonable view seems to me to be that after the Collector has exercised his power under Chapters IV and V by levying stamp duty, and the power of the Chief Controlling Revenue Authority is invoked by the aggrieved party under section 56 (1) and if thereafter, that Authority proceeds to exercise that power, it must also be viewed as the exercise of a quasi-judicial function It is immaterial for this purpose, whether that power is exercised at the instance of the aggrieved party or at the instance of the Revenue In the present case the Chief Controlling Revenue Authority has taken up the application of the party for disposal as an "appeal" against the orders of the Collector It has written out an elaborate order canvassing the grounds set out by the party in his "petition of appeal" From the circumstances of the case it has to be held that what was exercised by the Chief Controlling Revenue Authority in this case was not an administrative function but a quasi-judicial function invoked for the purpose of modifying the orders of the Collector in favour of the aggrieved party In such a case it is clear that the authority has to act quasi-judicially, just as in the case under section 56 (2) This carries with it an obligation to give opportunity to the party for being heard, especially when a large amount of duty and penalty is involved. In the present case the party himself has also asked for a personal hearing in his memorandum of appeal For the aforesaid reasons I am of the opinion that the requirements of natural justice had to be followed in this case where the Chief Controlling Revenue Authority was requested by the aggrieved party to interfere in a quasi-judicial capacity. That requirement carried with it an obligation to give the party a personal hearing I therefore allow the writ petition and quash the order of the 2nd respondent, the Commissioner of Land Revenue dismissing the appeal of the petitioner The 2nd respondent is directed to restore the appeal to his file and dispose it of after giving an opportunity to petitioner for a personal hearing. No order as to costs.

V S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE K. VEERASWAMI.

K. V. S. Varadaraja Chettiar .. *Petitioner**

v.

K. V. C. Chenni Veeri Chettiar and others *Respondents.*

Partition Act (IV of 1893), sections 2 and 3 (1)—Application under section 3 (1) following an application under section 2 —Subsequent withdrawal of application under section 2—Effect.

The only condition precedent for an application under section 3 (1) is a request under section 2 and once that condition has been satisfied, any subsequent withdrawal of the request under section 2 will be inconsequential to the continued maintainability of the application runder section 3 (1) Notwithstanding the withdrawal of the request under section 2, the application under section 3 (1) will have to be dealt with and disposed of on its merits

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court of Salem in I.A. No. 1474 of 1966 in O S. No 206 of 1964

* C R.P. No. 1951 of 1967. 26th August, 1968.

T. R. Ramachandran, for Petitioner

Mrs. S. S. Mathivanan, *S. T. Ramalingam*, for *G Ramanujam* and *K. Gopalaswami*, for Respondents.

The Court made the following

ORDER —This petition is directed against the order of the Subordinate Judge of Salem dismissing an application under section 3 of the Partition Act There was an application under section 2, but that application having been withdrawn the learned Subordinate Judge thought that the dismissal of the application under section 3 should automatically follow.

I am unable to accept that view Section 2 provides for sale of the property which is not capable of partition among the shareholders But such a sale can be ordered only at the request of the shareholders interested individually or collectively, to the extent of one moiety or upwards, in the property Under section 3, if a request of that kind has been made to the Court, any other shareholder may apply for leave to buy at a valuation the share or shares in the property and the Court shall then order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained The policy of this provision appears to be that third parties should be avoided and the partition by that process should be confined to the shareholders It seems to me that once a request has been made and an application on the basis of that request has also been filed under section 3 (1), the withdrawal of the request under section 2 will in no way affect the application under section 3 (1) Notwithstanding the withdrawal of the request under section 2, the application under section 3 (1) will have to be dealt with and disposed of on its merits The only condition precedent for an application under section 3 (1) is a request under section 2 and once that condition has been satisfied, any subsequent withdrawal of the request will be inconsequential to the continued maintainability of the application under section 3 (1).

Umrao Singh v *Umrao Singh*[1], does not appear to decide the point and there is no other case which directly deals with it. But *Rajagopala Chettiar* v. *Razack Sahib*[2], and *Vedachala Naicker* v. *Duraiswami Mudaliar*[3], provide the nearest parallel, which have been decided in the context of section 9 of the Madras City Tenants Protection Act, 1921 It has been held in those cases that the subsequent withdrawal of the suit will not render the application filed under section 9 infructuous, but the latter will have to be dealt with and disposed of according to the merits I think the principle of these cases will have application to the instant case.

The petition is allowed. The lower Court is directed to dispose of the application under section 3 (1) on its merits. No costs

V K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P S KAILASAM.

Southern Railway Mazdoor Union, represented by its General Secretary, P. Govinda Menon . *Petitioner**

v.

The General Manager, Southern Railway, Park Town, Madras-3 .. *Respondent*

Railway Establishment Manual, Paragraph 3610—*If a statutory rule—Withdrawal, by Government, of recognition granted to a union of employees without giving an opportunity to the union to show cause—Validity*

Rules 156 and 157 of the Indian Railway Establishment Code empower the Railway Board and the General Managers of Indian Railways to make rules with regard to non-gazetted railway servants under their control. As paragraph 3610

1 47 I C. 905 : A I R 1918 All 356
2 (1950) 1 M.L J 29
3 (1950) 1 M L J 732

* W P No 3531 of 1968. 18th December, 196

relates to the conduct and discipline of railway servants and as it has been framed by the Railway Board, the paragraph has statutory authority.

The paragraph specifically provides that the recognition of a union, when once it is granted, will not be withdrawn without sufficient cause and without giving an opportunity to the association to show cause against such withdrawal As paragraph 3610 is statutory in nature, the failure to comply with the requirement of giving an opportunity to the association to show cause against such withdrawal would vitiate the order.

Even if the contention that the paragraph is administrative in character is accepted, the withdrawal of the recognition without giving an opportunity to the association will be against the principles of natural justice It has been held that the authority which framed the rules will have to follow that rule whether it is statutory in character or not.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of *certiorari* calling for the records in No. PB/Cs/33, on the file of the respondent herein, and quash the order, dated. 21st September, 1968, and made therein

B. R. Dolia of *M/s. Aiyar & Dolia* and *A. L. Somayaji*, for Petitioner.

The Standing Counsel for the Central Government for *S Govind Swaminathan*, *K. C. Jacob* and *S. K L. Ratan*, for Respondent.

The Court made the following

ORDER.—This petition is filed by the Southern Railway Mazdoor Union, represented by its General Secretary for the issue of a Writ of *certiorari* to call for the records on the file of the General Manager, Southern Railway and to quash his order dated 21st September, 1968, withdrawing recognition to the petitioner-Union

The petitioner is a trade union registered on 13th February, 1961 under the provisions of the Trade Union Act, 1926 Class III and Class IV Employees of the Southern Railway are members of the petitioner-union and the strength of membership of the petitioner-union as on 31st December, 1967 is 43,737 The petitioner-union was recognised by the Railway by its order dated 21st September, 1966.

The Central Executive Council of the petitioner-union met at Coonoor on 25/26th June, 1968 and passed a resolution deciding to advise the members to go on a token strike on 19th September, 1968 The resolution was conveyed to the Railway on 3rd September, 1968 On 13th September, 1968, the Central Government passed an Ordinance prohibiting the staff from going on or joining the strike, and providing certain consequences such as break of service which would follow from the participation of the strike. The Ordinance was published on 14th September, 1968. On 19th September, 1968 several members of the petitioner-union went on a token strike. The petitioner states that the Union as a Union did not go on a strike. On 21st September, 1968, the impugned order withdrawing recognition was passed.

The order is challenged as not in conformity with the provisions of paragraph 3610 of the Indian Railway Establishment Manual which provide that granting and continuance of recognition vests with the discretion of the Government, but recognition when granted will not be withdrawn without due cause and without giving an opportunity to the Association to show cause against such withdrawal. According to the petitioner-union, paragraph 3610 is a statutory rule and it is obligatory on the Railway to give notice before withdrawing the recognition It is submitted that even if paragraph 3610 is an administrative rule, the Railway is bound to follow it and any order passed without giving notice to the petitioner will be in violation of the principles of natural justice

The Railway in its counter affidavit submitted that paragraph 3610 is not a statutory rule, and that it is only administrative in nature It is also submitted that the petitioner sent a notice on 3rd September, 1968 conveying its decision to advise its members to go on a token strike on 19th September, 1968 and that after an Ordinance was passed on 13th September, 1968, the petitioner-union did not take part in the conciliation proceedings before the Assistant Labour Commissioner for calling off the strike on 17th September, 1968 It is alleged that the conduct of the petitioner was deliberate and the petitioner had the intention to pursue its illegal action and take part in the illegal strike It is the contention of the Railway that as the petitioner-union had failed to adopt legal means to representing its case, the petitioner cannot claim, having participated in the illegal strike, that it should be given an opportunity before its recognition is withdrawn According to the Railway, the withdrawal of the recognition was for due cause and the petitioner-union cannot complain that it was not given an opportunity.

The question that arises for consideration is the effect of the paragraph 3610 of the Indian Railway Establishment Manual which runs as follows :

> " Government is prepared to accord official recognition to associations of its industrial employees. The grant and continuance of recognition rests in the discretion of Government, but recognition when granted will not be withdrawn without due cause and without giving an opportunity, to the association to show cause against such withdrawal "

Paragraphs 3610 to 3612 in Part B of Chapter XXXVI, Rules for the recognition of service Associations of Railway servants, are in concordance Rules 1 to 3, Part B of Appendix XIII-RI (1951 reprint) and Railway Board's letter No E (L) 62 AS 2-I, dated 7th March, 1963 and case No E 56 (Manual) 1/XXXVI. In the 1951 edition of the Indian Railway Establishment Code, Volume I, the rule corresponding to paragraph 3610 is Rule 1 in Part B, Rules for the recognition of associations of non-gazetted Railway Servants, of Appendix XIII Appendix XIII contains rules for the recognition of service associations of Government servants. Appendix XIII refers to rules 26 and 27 of Appendix XI Appendix XI contains Railway Servants' Conduct Rules framed under rule 1701 Rules 26 and 27 to which reference is made in Appendix XIII relate to membership of service and labour associations of Railway servants and subsidiary instructions Rule 26 in Appendix XI prohibits gazetted railway servants from being a member, representative or officer of any association representing or purporting to represent Government servants or any class of such servants unless such association satisfies the conditions enumerated in the rule Rule 27 empowers the Agent to issue subsidiary instructions as may be found necessary in regard to the conduct of non-gazetted railway servants under him, and may authorise the head of a Department to do so Thus, in the Appendix relating to Railway Servants' Conduct Rules, the membership of service and labour association of Railway servants is regulated Appendix XIII which relates to recognition of service associations of Government servants, provides for recognition as well as for withdrawal of service associations Appendices XI and XIII will have to be read together and rule 1701 under which Appendix XI is framed relates to the conduct and discipline of the Railway servants Rule 1701 provides that without prejudice to the provisions of any law, for the time being in force, relating to the conduct of Government servants, or to the rules made under section 47 (*e*) of the Indian Railways Act (IX of 1890) as amended, the conduct of Railway servants shall be governed by the rules contained in Appendix XI The rules under this Chapter, namely, Chapter XVII, provide for discipline and appeal rules for non-gazetted staff So far as this Chapter is concerned, as the rules relate to the service conditions, whether they are framed by the President or by a delegate of the President as envisaged under Article 309, the rules will be statutory in character.

It was submitted that so far as the rules relating to recognition of association are concerned, they will not fall under Discipline and Appeal Rules relating to the staff or under the provisions of Article 309. This contention cannot be accepted,

for, reading rule 1701, rules 26 and 27, Appendices XI and XIII, it appears that the scheme of the rules is to provide for permitting the Government servants to form associations only under certain circumstances, the Government servants being prohibited from joining associations if the conditions are not satisfied Chapter XVII, section II relating to discipline and appeal rules for the staff and Appendices XI and XIII should be read as part of the rules relating to the conduct and discipline in section 1 of Chapter XVII In the prefatory note to the 1951 edition of the Indian Railway Establishment Code, Volume I, it is stated that " the rules contained in this Code have been made by the Governor-General-in-Council under sub-section (2) of section 241 of the Government of India Act, 1935, in supersession of all pre-existing rules relating to the same matters, and are published in this Code under his authority They govern the conditions of service of Railway servants who are subject to the rule-making control of the Governor-General-in-Council " Though the prefatory note cannot be read as meaning that all the rules in the First Volume had been made by the Governor-General-in-Council, the contention on behalf of the petitioner that the impugned rule is one under sub-section (2) of section 241 of the Government of India Act, 1935 derives some support A reference to Appendix 12, Concordance, in the 1968 edition of the Indian Railway Establishment Manual indicates that paragraph 3610 is in concordance with the Railway Board's Circular. Rules 156 and 157 of the Indian Railway Establishment Code empower the Railway Board and the General Manager of Indian Railway to make rules with regard to non-gazetted railway servants under their control As paragraph 3610 relates to the conduct and discipline of Railway servants and as it has been framed by the Railway Board, the paragraph has statutory authority and the contention of the learned Counsel for the petitioner that the paragraph is statutory in nature will have to be accepted.

The paragraph specifically provides that the recognition of a union, when once it is granted, will not be withdrawn without sufficient cause and without giving an opportunity to the association to show cause against such withdrawal In this case, it may be that the Railway had proper cause for withdrawing the recognition. But the other requirements, namely, that the association should be given an opportunity against the withdrawal of the recognition has not been complied with. As paragraph 3610 has been found to be statutory in nature, the failure to comply with the requirement of giving an opportunity to the association to show cause against such withdrawal would vitiate the order.

Even if the contention of the learned Counsel for the Railway that the paragraph is administrative in character is accepted, the withdrawal of the recognition without giving an opportunity to the association will be against the principles of natural justice It has been held that the authority which framed the rules will have to follow that rule whether it is statutory in character or not Even if it is an administrative rule, it is incumbent on the authority to follow the rule Vide *Nagarathinammal* v *Ibrahim Saheb*[1].

Mr Govind Swaminathan, learned Counsel for the respondent submitted that the petitioner had given notice of strike and even after the Ordinance was passed declaring the strike to be illegal and providing for certain consequences in the event of the employees taking part in the strike, the petitioner-union continued in its illegal activities Learned Counsel pointed out that the petitioner-union failed to take part in the conciliation proceedings held by the Concilation Officer on the 17th September, 1968 and in the circumstances the conclusion is irresistible that the petitioner-union was deliberately indulging in unlawful activities and the giving of an opportunity would only be an empty formality Mr Dolia on behalf of the petitioner submitted that if the petitioner-union had been given an opportunity,

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1 (1955) 2 M L J 49 : I L R (1955) Mad 460.

it would have contended amongst other pleas that the petitioners as a union did not take part in the strike, but only some of the members without heeding to the association took part in the token strike From the fact that the petitioner-union gave notice of strike which was not illegal at that time and from the circumstance that the Ordinance was passed on the 13th September, 1968, it cannot be said that the only irresistible conclusion is that the petitioner-union intended to take part in the token strike which was declared illegal Even if the paragraph providing for giving an opportunity to the petitioner-union is administrative in character, an order cannot be passed to the prejudice of the union without giving it an opportunity against withdrawal of the recognition Even on the basis that the order is only administrative in character, as the order has been passed without notice to the petitioner-union, the order cannot be sustained The impugned order has, therefore, to be quashed Mr Dolia submitted that the matter is likely to be settled and the action against the union is likely to be dropped by the Government It will of course be open to the Railway to take such action as it deem fit in accordance with law The Writ petition is allowed There will be no order as to costs

V.K ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE A. ALAGIRISWAMI

Ramachandra Sarma . *Appellant**

v.

Ayeesha Begum and others *Respondents*

Specific performance—Contract to reconvey property entered into between two adults—Rights under, assigned in favour of minors—Assignee minors if can specifically enforce the contract —Application of test of mutuality—Relevant date

Where the rights under an agreement to resell certain property, entered into between two adults, is assigned in favour of minors, it cannot be said that the assignee-minors could not specifically enforce the contract on the ground that the test of mutuality is not satisfied The fact that the assignees happen to be minors does not mean that the contract cannot be enforced by them or that it cannot be enforced as against them. The relevant date on which the test of mutuality is to be applied is the date of the contract itself and not the date on which it is sought to be enforced.

Case-law discussed.

Appeal against the decree of the District Court, Salem, dated 16th December, 1963 in A S No 485 of 1962, preferred against the decree of the Court of the District Munsif of Dharmapuri in O S No 44 of 1961.

V. V. Raghavan and *T. S Subramaniam* for Appellant

C. S. Swaminathan, for Respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit for specific performance The suit property belonged to the father of the plaintiffs He sold the suit property on 24th January, 1956 to the defendant. On the same date, the defendant executed a registered deed of agreement for resale in favour of the plaintiffs' father. On 12th July, 1957, the plaintiffs' father assigned the rights under the agreement of resale in his favour to the plaintiffs To the plaintiff's claim for specific performance the defendant's contention was that the father of the plaintiffs had no right to assign the agreement of reconveyance, that there was no valid tender and that the suit was not maintainable, as the plaintiffs were minors The only question of substance that was argued before this Court was that the plaintiffs could not maintain this suit as they are minors and the test of mutuality is not satisfied in this case The

* S A No 204 of 1964. 1st March, 1968.

plaintiffs based their contention on the decision in *Sarwarjan* v *Fakhruddin*[1], which was followed by a Full Bench of this Court in *Venkatachala Pillai* v *Sethuramarao*[2] In the Privy Council case in *Mir Sarwarajan* v *Fakhruddin*[1], the guardian of a minor entered into an agreement with another for the purchase of certain immoveable property by the minor The minor after attaining majority sued for specific performance of the contract. Their Lordships laid down the law as follows —

> " They are however of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor in the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

In *Venkatachala Pillai* v *Sethuramarao*[2], there was a sale in respect of a minor's property executed by his guardian and there was a covenant that in case the vendee sold the property, he should resell it to the minor or his heirs It was held as follows

> " that the agreement for sale in the sale deed being an executory contract without mutuality was unenforceable by either party in a suit for specific performance irrespective of the question whether the contract was for the benefit of the minor or not ".

Before the Full Bench an attempt was made to get over the effect of the Privy Council decision by urging that as in the case before the Full Bench, the contract was for the benefit of the minor he should be able to enforce specific performance of the contract. But the Full Bench pointed out that in the case before the Privy Council the contract was validly entered into and was for the benefit of the minor and was even ratified by him. The effect of these decisions seems to be considerably shaken by a later decision of the Privy Council in *Subramaniam* v *Subbarao*[3] Dealing with this question under the heading " Minors and the Doctrine of Mutuality " in his book " The Law of Specific Relief " Professor G C Venkatasubba Rao at page 159 observes as follows :—

> " Since the decision of the Privy Council in *Mir Sarwarajan* v *Fakruddin*[1], it must be taken as settled law that the doctrine of mutuality applies to India......"

He observes at page 160 as follows :—

> " Thus it is clear that an executory contract for the transfer of immoveable property in favour of a minor is not capable of specific performance In *Venkatachala Pillai* v *Sethurama Rao*[2], dealing with an agreement of resale contained in a sale deed executed by a guardian and sought to be enforced by the minor after attainment of majority, the Madras High Court observed—" The validity or enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not " That contract was held to be unenforceable specifically as it was lacking in mutuality. . . .".
>
> It may therefore be taken as well settled that an executory contract for the purchase of immoveable property entered into by a guardian on behalf of the minor is not capable of specific performance either by or at the instance of the minor purchaser ".

At page 162 it is observed as follows :

> " A recent decision of the Privy Council in *Subaramaniam* v. *Subbarao*[3], has considerably shaken the authority of the long catena of decisions noticed above. In

1. (1912) L R 39 I A 1 : 21 M L J. 1156 I.L R 39 Cal 232 (P C)
2. (1933) 64 M L J 354 I L R 56 Mad 433 : A.I R 1933 Mad 322 (F B).
3. (1948) L R 75 I A 115 I L R (1949) Mad 141 (1948) 2 M L J 22 A.I R 1948 P C. 95

the case before the Privy Council the mother as the guardian of her minor son entered into an agreement for the sale of the minor's lands. The intended transferee was put in possession pursuant to the contract The minor, however, sued by his next friend for recovery of possession of the properties The defendant-vendee relied upon the doctrine of part performance embodied in section 53-A of the Transfer of Property Act IV of 1882. The Madras High Court held that section 53-A could not be invoked by the defendant as the minor plaintiff was not a 'transferor' as contemplated by that section This decision was reversed by the Privy Council Referring to the power of the guardian to enter into the contract of sale the Privy Council observed.

> 'Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29th November, 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu law.'

The conclusion of their Lordships is thus formulated :

> 'It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, not his mother, was owner If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother.'

It may also be noticed that Lord Morton of Henryton in the above case expressly refers to and approves a passage in Pollock and Mulla's Commentary on the Indian Contract and Specific Relief, Act, 7th Edition page 70, where the learned authors observe that in the case of a contract entered into on behalf of a minor by his guardian,

> " the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, it is for the benefit of the minor. But if either of those two conditions is wanting, the contract cannot be specifically enforced at all That the first of these conditions is wanting in the case of a contract by the guardian for the purchase of immoveable property on behalf of the minor is perfectly clear from *Mir Sarwarjan's case*[1] That neither of the two conditions need be wanting when the contract is for the sale of the minor's immoveable property is equally clear from the latest decision of the Privy Council in *Subramania* v. *Subbarao*[2] A contract for the purchase of immoveable property can rarely be demonstrably for the benefit of the minor's estates or for legal necessity but the same cannot be said of a contract for sale of the minor's property. This seems to be the basis for drawing a distinction between contracts for the purchase of property and contracts for sale entered into on behalf of minors".

At page 163 occurs the following passage

> " . A Full Bench of the Madras High Court has taken a different view. Govinda Menon, J , expressed the view that the effect of the later Privy Council decision is to render the principle of mutuality inapplicable to contracts for sale of the minors' property leaving that doctrine still applicable to a contract of purchase of property for the minor which was the spcific case dealt with by the earlier Privy Council decision These conflicting decisions were considered in *Abdul Sattar* v. *Ismail*[3], by the Madya Pradesh High Court Newesker, J , was inclined to the view that the decision of the Privy Council in *Mir Sarwarjan's case*[1], is not overruled by the later decision thus endorsing the opinion of the Full Bench of the Madras High Court. The other learned Judge Srivastava, J , however, did not share this

1 (1912) I L R 39 Cal 232· L R 39 I A 141 · (1948) 2 M L J. 22 · A I R. 1948 P C 95. 1 : 21 M L J 1156 (P C)

2. (1948) L.R. 75 I A. 115· I L R (1949) Mad.

3 A.I R 1958 M P. 373.

view and was inclined to agree with the Full Bench decision of the Andhra Pradesh High Court."

"This case focusses attention on the incompatibility between the decision in *Mir Sarwarjan's case*[1], and *Subramania* v *Subbarao*[2] The learned Judges who have distinguished the later Privy Council decision and have held that it has not shaken the authority of the earlier Privy Council ruling have not pondered over a situation in which both vendor and vendee are minors acting through their guardians That the minor purchaser can say 'I rely on *Mir Sarwarjan's case*[1] This is a contract of purchase So it is beyond the power of my guardian to bind me. Ergo it cannot be specifically enforced against me' To this the minor seller would say. 'I rely on *Subramania* v *Subbarao*[2] This is a contract of sale It is for legal necessity My guardian can enter into this contract Ergo I can specifically enforce it' How are we to resolve this tangle? It is respectfully submitted that the Full Bench decision of the Madras High Court has erred in supposing that the two Privy Council decisions can stand together The Full Bench of the Andhra High Court has rightly held that the earlier Privy Council decision must be deemed to have been overruled by the later pronouncement."

It appears to me that on principle the contention on behalf of the appellant cannot be supported In this case the agreement for reconveyance was in favour of the plaintiffs' father. That contract was not hit by the doctrine of want of mutuality. The only question that arises, therfore, in this case is whether because the plaintiffs who are the assignees of the contract in favour of their father, are all minors, they cannot enforce the contract for specific performance on the ground that the defendant would not be able to enforce the contract for specific performance as against the plaintiffs It would not be correct to say that the defendant would not be entitled to enforce the contract of specific performance as against the plaintiffs A contract by a minor is void The effect of the Privy Council decision in *Mir Sarwarjan* v. *Fakruddin*[1], is that a contract on behalf of a minor for purchase of a property is not valid and binding on the minor The present is not a case of a contract by a guardian of a minor on behalf of the minor to purchase the property for the minor. The original contract is between the two adults and the contract is certainly valid. The fact that the assignee happens to be a minor does not mean that the contract cannot be enforced by the assignee minors or that it cannot be enforced as against the assignee minors The relevant date on which this test of mutuality is to be applied is the date of the contract itself and not the date on which it is sought to be enforced In *Venkatachala* v *Sethuramarao*[3], it was pointed out at page 325, that want of mutuality must be judged as on the date of the contract In Fry's Specific Performance of Contracts, 6th Edition at 219, it is stated that contract to be specifically enfoced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them The further observation of the learned author that an infant cannot sue, because he could not be sued for a specific performance can only, therefore, refer to a case where the infant himself enters into a contract The two cases relied on by him in support of this observation are both cases of contracts entered into by minors *Flight* v *Bollard*[4] and *Lumpley* v *Revenscroft*[5] In both those cases, if the defendants had sued for specific performance the minor plaintiffs could have successfully urged that the contracts entered into by them could not be enforced against them as they were minors at the time the Contracts were entered into There being thus no mutuality the plaintiffs were not entitled to sue

In Corpus Juris Secundum, Volume LXXXI, the position regarding mutuality is stated thus at page 430.

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1 (1912) I L R 39 Cal 232 L R 39 I A 21 M L J 1156 (P C)
2. (1948) 2 M L J 22 I L R (1949) Mad 141 · L R 75 I A 115 A I R 1948 P C 95
3 (1933) 64 M L J 354 : I L R 56 Mad 433 A I R 1933 Mad 322
4 Russels reports 1827-28-8 and 9 George IV p 298
5 L R (1895) 1 Q.B. 684.

"Where an infant plaintiff claims under a party who himself could have obtained specific performance, such infancy is no ground for refusing specific performance Likewise, specific perfrmance has been allowed for, or on behalf of, an infant where the contract involved was made for him by one competent to do so Where there has been complete performance by the infant, his infancy has been held to be no bar to specific performance"

There is, therefore, no valid legal objection to granting a decree for specific performance in favour of the plaintiffs in this case

The defendant's appeal, therefore, fails and it is dismissed with the costs of the plaintiffs to be paid by the defendants No leave

V K *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE P S KAILASAM.

C Kanagavelu .. *Petitioner**

v

The Tahsildar, Cuddalore, South Arcot District, and others . *Respondents*

Madras Panchayat Act (XXXV of 1958), sections 147 (1) (ii) and 152—Scope—Section 147 (1) (ii), if has reference to a motion of 'no-confidence' in the President moved by the members—Collector, if could act without giving opportunity to the authority or person concerned

In this case the Collector does not specify under what sub-clause of section 147 (1) (*ii*) of the Madras Panchayat Act XXXV of 1958, he was acting The three sub-clauses in section 147 (1) (*ii*) obviously relate to resolution, order, licence, permission or act of the Panchayat and has no reference to a motion of 'no confidence' in the President moved by the members of the Panchayat. In any event, even if the Collector had purported to act under any of the sub-sections of section 147, he is prohibited from taking any action before giving the authority or person concerned an opportunity for explanation Therefore, the order of the Collector is unsustainable in that it is beyond his powers

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed therewith the High Court will be pleased to issue a Writ of *mandamus* directing the 1st respondent herein to hold the Special meeting of the Kurinjipadi (Town) Panchayat under the provisions of section 152 of the Madras Act (XXXV of 1958) in pursuance of the notice of motion of no-confidence in the 3rd respondent served on the 1st respondent on 14th December, 1967 in W P No 624 of 1968 and to issue a Writ of *certiorari* calling for the records of the 1st respondent relating to P D 2/1463-68 dated 10th January, 1968 (in W P No 1165 of 1968) and quash the said order and made therein

V P Raman and *S R Srinivasan*, for Petitioner in W P No. 624 of 1968 and in W P No 1165 of 1968

S K L Ratan, for Respondents 3 in W P No 624 of 1968 and Respondent 2 in W.P No. 1165 of 1968.

S T Ramalingam, for Government Pleader for Respondents 1 and 2 in W P. 624 of 1968 and for Respondents 1 and 3 in W P No. 1165 of 1968.

The Court made the following

ORDER —W P No 624 of 1968 is filed by a member of the Kurinjipadi Panjayat for the issue of a writ of *mandamus* directing the Tahsildar, Cuddalore (first respondent) to hold a special meeting of the Kurinjipadi Panchayat under the provisions of section 152 of the Madras Panchayat Act XXXV of 1958 W P No. 1165 of 1968 is filed by the same member for the issue of a writ of *certiorari* to call

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*W P Nos 624 and 1165 of 1968 26th November 1968

for the records of the Collector of South Arcot (first respondent) relating to P D. 2/1463-68, dated 10th January, 1968 and quash the same

The petitioner and eight other members of the Panchayat gave a notice of 'no-confidence' motion against the President of the Panchayat and delivered it to the Tahsildar of Cuddalore on 14th December, 1967 The Tahsildar by his notice dated 2nd January, 1968 intimated that a special meeting of the Panchayat will be held on 18th January, 1968 at 4 P M in the Panchayat office building It is stated by the petitioner that he and the other members attended the meeting at the appointed hour on 18th January, 1968 and waited till 5 P M but the Tahsildar did not turn up. The petitioner sent a telegram to the Tahsildar and Collector intimating the fact of the Tahsildar's absence at the meeting By their letter dated 29th January, 1968 the petitioner and the other members pointed out to the Tahsildar that they were hoping to hear from him regarding the fixation of a fresh date for the meeting The Tahsildar replied by his letter dated 2nd February 1968 enclosing a copy of a letter dated, 19th January 1968 that the special meeting stood cancelled by reason of the orders of the Collector dated 10th January 1968. Then the petitioner and other members wrote to the Collector on 4th February 1968 asking to furnish them with a copy of the order dated 10th January 1968 and asking him for further particulars about his order dated 10th January 1968 It is alleged by the petitioner that the third respondent President, Panchayat Board, Kurinjipadi, is desparately trying, despite having lost the confidence of more than two-thirds of the Panchayat members, to prevent the subject of 'no-confidence' in him from coming up for discussion by raising false and frivolous pleas The petitioner also denied the suggestion that he and other members, who gave notice of the motion of 'no-confidence,' ever resigned their membership. On these facts the petitioner filed W P. No. 624 of 1968 praying for the issue of a writ of *mandamus* directing the Tahsildar to hold a special meeting under section 152 (4) of the Act

The order of the Collector dated 10th January, 1968 directing the Tahsildar not to hold the meeting is challenged as illegal and beyond the competence of the Collector in W P. No 1165 of 1968.

The Collector in his order, dated 10th January, 1968 mentions that the President of the Kurinjipadi Panchayat represented to him that the members who had signed the supposed motion of 'no-confidence' against him, had resigned their membership already and that they had no right to move a motion of 'no-confidence' and that he enquired into that representation According to the Collector, 13 members of the Panchayat had sent the letter of resignation to the President and that their resignation was found to have been accepted on 30th November, 1967 by the President The Collector then proceeds to state that the signature found in the letter of resignation were unequivocally those of the members and that there was no dispute about their signatures and in those circumstances he was of the view that those members cannot continue to be members of the Panchayat and therefore they had no *locus standi* to give a motion of 'no-confidence' against the President Therefore, the Collector concluded that the holding of the meeting of the Panchayat on 18th January, 1968 as proposed by the Tahsildar of Cuddalore, was not desirable. Acting under the powers conferred by section 147 (1) (ii) of the Act, the Collector directed that the meeting of the Kurinjipadi Town Panchayat convened on 18th January, 1968 by the Tahsildar shall not be conducted and the notices issued for the said meeting will stand cancelled

The order of the Collector dated 10th January, 1968 directing the Tahsildar not to conduct the meeting is clearly beyond his powers Section 152 of the Act prescribes the procedure for making a motion of 'no-confidence' in the President or Vice-President of a Panchayat The procedure prescribed is as follows A written notice of the intention to make the motion, signed by members of the Panchayat not less in number than one-half of the sanctioned strength of the Panchayat, together with a copy of the motion which is proposed to be made, and a written statement of the charges against the President, should be delivered in person to the Tahsildar of the Taluk by any two of the members of the Panchayat

signing the notice. Sub-section (3) requires that a copy of the statement of charges along with the notice of the meeting should be caused to be delivered to the President by the Tahsildar and the President should be required to give a statement in reply to the charges within a week of the receipt of the notice by him Sub-section (4) requires the Tahsildar to convene a meeting for the consideration of the motion at the office of the Panchayat at a time appointed by him. The Tahsildar is also required to give to the members notice of not less than 15 clear days of such meeting and of the time appointed therefor The Tahsildar has to preside at the meeting convened In the present case the requirements of sub-sections (2) and (3) were complied with and the Tahsildar had given notice of the convening of the meeting for the consideration of the motion of 'no confidence' At this stage, the Collector had passed the impugned order dated 10th January, 1968. The Collector has purported to act under section 147 of the Act. The relevant part of the section runs as follows :

" 147. (1) The Inspector may, by order in writing—

(i) suspend or cancel any resolution passed, order issued, or licence or permission granted or

(ii) prohibit the doing of any act which is about to be done or is being done, in pursuance or under colour of this Act, if in his opinion,—

(*a*) such resolution, order, licence, permission or act has not been legally passed, issued granted or authorised,

(*b*) such resolution, order, licence, permission or act is in excess of the powers conferred by this Act or any other law or an abuse of such powers or is considered by the Inspector to be otherwise undesirable, or

(*c*) the execution of such resolution or order, or the continuance in force of such licence or permission or the doing of such act is likely to cause danger to human health or safety, or is likely to lead to a riot or an affray.... .. . "

Before taking action under this section the Inspector is required to give the authority or person concerned an opportunity for explanation. Section 147 authorises the Collector to suspend or cancel any resolution passed or order issued, or licence or permission granted by the Panchayat. The power under section 147 (1) (*ii*) prohibiting the doing of any act which is about to be done or is being done, is with regard to the resolution passed, order issued or licence or permission granted, which was not done legally by the Panchayat In this case the Collector does not specify under what sub-clause of section 147 (1) (*ii*) he was acting. But the several sub-clauses under section 147 (1) (*ii*) relate to resolution, order, licence, permission or act which had not been legally passed, issued, granted or authorised, or such resolution, order, licence, permission or act which is in excess of the powers conferred by the Act or any other law or an abuse of such powers or is considered by the Inspector to be otherwise undesirable and the execution of such resolution or order, or the continuance in force of such license or permission or the doing of such act is likely to cause danger to human life, health or safety, or is likely to lead to a riot or any affray Thus, the three sub-clauses in section 147 (1) (*ii*) obviously relate to resolution, order, licence, permission or act of the Panchayat and has no reference to a motion of 'no confidence' in the President moved by the members of the Panchayat. In any event, even if the Collector had purported to act under any of the sub-sections of section 147, he is prohibited from taking any action before giving the authority or person concerned an opportunity for explanation. It is needless to state that the observations of the Collector in his order that the signatures found in the letter of resignation were unequivocally those of the members and that there was no dispute about the signatures of the members cannot stand. Therefore, the order of the Collector is unsustainable in that it is beyond his powers and was passed without giving an opportunity to the authority or person concerned for an explanation. On this finding, W.P. No 1165 of 1968 will have to be allowed.

So far as W.P No. 624 of 1968 is concerned, it is the statutory duty of the Tahsildar to convene a meeting on receipt of a due notice of motion of 'no confidence' in the President under section 152 (2) of the Act. In this case the Tahsildar had in fact convened a meeting, giving notice of it. The notice of the motion of 'no confidence' was given on 14th December, 1967 and the Tahsildar had fixed the meeting for 18th January, 1968 That meeting has yet to take place. The petitioner's complaint is that it is due to the anxiety of the third respondent to continue in office, in spite of having lost the confidence of more than two-thirds of the Panchayat members The allegations made by the petitioner in his affidavit in support of W.P No 624 of 1968 have already been referred to The submission on his behalf is that the third respondent is desperately trying, despite having lost the confidence of more than two-thirds of the Panchayat members, to prevent the subject from coming for discussion by raising all sorts of false and frivolous pleas They have also stated that the petitioner and the other members have heard that the President is relying upon an alleged resignation of members. It is the petitioner's case that the plea of resignation is totally baseless It is significant that the Tahsildar himself saw no reason why the meeting ought not to be convened pursuant to the notice of the petitioner and others The learned Government Pleader submitted that he had been instructed by Government not to defend this writ petition The third respondent, strangely, has not filed any counter affidavit It is stated from the Bar that the counter-affidavit is ready, there is no satisfactory explanation as to why it has not been filed in Court At the request of the parties these two writ petitions were posted for hearing to this date In the absence of a counter-affidavit from the third respondent the Court will have to proceed on the basis that the allegations in the affidavit of the petitioner have not been controverted

Learned Counsel for the petitioner relied on a communication of the Revenue Divisional Officer, Chidambaram to the Collector of Cuddalore, dated 6th January, 1968, in support of his contention that the petitioners and other members never resigned. But the learned Counsel for the third respondent relied on a phone message given by the Executive Officer of the Panchayat in which it is stated that the last meeting of the Panchayat was held on 3rd November, 1967 From this statement the learned Counsel wanted to submit that the members could not have attended any meeting after the date of their resignation It is unnecessary to go into this question for, in the absence of any counter-affidavit from the third respondent and in view of the stand taken by the Government, it must be taken that the allegations made by the petitioner stand proved In this view, a writ of *mandamus* directing the Tahsildar, Cuddalore, to discharge his statutory duty will have to issue The Tahsildar will proceed to convene the meeting as required by section 152 of the Act.

Learned Counsel on both sides brought to my notice that on 17th October, 1968 a civil suit has been filed by the President and that an interim injunction has been obtained against the thirteen members and the Panchayat of Kurinjipadi. The direction to the Tahsildar to convene the meeting will be subject to the orders of the civil Court in the petition for grant of interim injunction or in any other proceeding before it.

The two writ petitions are allowed with costs Counsel's fee Rs. 250 in each writ petition The costs will be paid by the third respondent in W.P. No. 624 of 1968 and the second respondent in W P. No 1165 of 1968.

V.M K. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

K. S. Vaidyanathan and others .. *Appellants**

v.

Messrs Buhari & Sons (P) Ltd. and another .. *Respondents*

Easement—Easement of necessity and right to light and air—Claim for—Scope.

An easement of necessity is one without which the property in question cannot be enjoyed at all and not one merely necessary for the reasonable or convenient enjoyment of the property.

Where a plaintiff can have access to his property by making necessary alterations in his own property, there cannot be said to be any easement of necessity over a property belonging to another.

A person who had alienated one of his buildings would certainly be entitled to claim the right to light and air as apparent and continuous easement which he was enjoying at the time of the severance

Appeal against the decree of the Second Additional Judge, City Civil Court, Madras, in A S No. 162 of 1966 preferred against the decree of the Second Assistant Judge, City Civil Court, Madras in O S. No. 3205 of 1964

V Tyagarajan and *M. Ramachandran*, for Appellants

K. K. Venugopal and *G Narayanan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. They are the owners of what is called the S I R Ice Factory No 1, Whannels Road, Madras They filed the suit for a declaration of their right of way along the red marked road in the plaint plan for access to three buildings marked as No. S-1, 2 and 3 in the plan and also for an injunction restraining the defendants from putting up a transformer, which would have the effect of interfering with the enjoyment by the plaintiffs of light and air for the said buildings. Both the Courts below have held against the plaintiffs.

The first plaintiff's father purchased No 1, Whannels Road, Egmore, Madras, in 1911 The first plaintiff purchased No 2, Whannels Road, Egmore, known as 'Edinboro house' in 1914. The red marked road leads to Edinboro house from Whannels Road. The plaintiff's claim was that this red marked road was the road for reaching the buildings marked as No. S-1, 2 and 3 in the plaint plan. The first plaintiff executed a settlement deed on 28th December, 1956 in favour of his son over Edinboro house and the son sold that property to the defendants. Building No 2 has been in existence from 1911 and No 1 from 1913 onwards. The access to the first floor of building Nos. 2 and 3 was through the disputed road by erecting stair-cases in 1946. The access to the No. 1 building had also been always through the disputed road.

In this case, there is no question of any right of way by grant. Neither the settlement deed in favour of the first plaintiff's son, nor the sale deed by him in favour of the defendants reserved any right in favour of the first plaintiff, nor have the plaintiffs established their right of way by prescription Till 1956 both the properties were owned by the same person and as no right of way was reserved by the settlement in favour of the plaintiff's son and right of way by prescription, cannot be said to have been acquired after 1956, the plaintiff's claim has to be decided on the basis of its being an easement of necessity Clearly the Courts below were right in holding that there is no easement of necessity in this case An easement of necessity is one without which the property in question cannot be enjoyed at all and

*S.A. No 1874 of 1967. 27th April, 1968.

not one merely necessary for the reasonable or convenient enjoyment of the property. (See the decisions in *Krishnamarasu* v. *Marraju*[1], *Narayana Gajapathiraju Bahadur Garu* v. *Rani Janaki Bathayamaji Garu*[2] and *Mariyayi Ammal* v *Arunachala*[3]. Till 1946 access to No 1 building was only from the property which now belongs to the plaintiffs It was only when the ground floor of that building was converted into cold storage and sales room for the ice factory in 1946, a door way was opened in the disputed road side to reach the residential quarters in the upstairs portion by closing the entrance of that first floor from the ground floor. That stair-case is still available Therefore, access to this building could be provided by the plaintiff making the necessary changes in their building In respect of No 3 building the ground floor alone was put up in 1944 with entrance from the Ice factory side. When the first floor construction was put up in 1946 the entrance to the first floor was opened from the disputed road side by erecting a stair-case. A stair-case can easily be constructed inside the ice factory premises to reach the first floor of No. 3 building. In respect of No. 1 building, there is a small wicket gate opening to the Ice factory side Therefore, all these buildings could easily be reached by making some small changes in the property belonging to the plaintiffs.

But it is urged on behalf of the plaintiffs that in law, it is unnecessary for the plaintiffs to make alterations in their building in order to have access to their properties and that if their buildings cannot be reached except by making alterations to their building and if it is necessary to pass through the servient tenement, then it should be held to be an easement of necessity. They also point out that in none of the Madras cases has it been held otherwise The Madras cases, of course, do not deal with the situation where any alterations have to be made to the dominant tenament. But the Allahabad High Court and Nagpur High Court have dealt with exactly similar situations and held that where a plaintiff can have access to his property by making necessary alterations in his own property, there cannot be said to be any easement of necessity over a property belonging to another. In *Sukhadein* v. *Kedarnath*[4] the contention, that where an alteration to the existing state of building was necessary for having access to that building, it should be considered that there was an easement of necessity over the defandants' building for the purpose of reaching the plaintiff's building was rejected In *Md. Ata Hussain* v. *Quadir Baksh*[5], the right of passage for a sweeper to the latrine was held not available as an easement of necessity as the plaintiff could make provision for it by opening a door in his own building. In *Ahmed Ali* v. *Dhonda Dasarath*[6], where a plaintiff claimed a right of way over a stair-case as an easement of necessity and it was found that the plaintiff could have another access to the upper storey of his house by constructing one or more stair-cases, the easement was not one of necessity. These decisions are well founded on principle and following them I hold that there is no easement of necessity made out in this case and the judgment of the Courts below on this point is undoubtedly right.

Coming now to the question of a right to light and air, it is found that there are no openings facing the disputed strip of land in the ground floor of No. 2 building and the proposed construction does not also come up to the building. In regard to No 3 building, there are eight windows in the ground floor and seven openings to the balcony in the first floor, all facing the disputed portion. The proposed construction is in front of this building. Here also there is no question of any prescriptive right to light and air over a period of 20 years, nor any question of grant or reservation But the plaintiffs would certainly be entitled to claim the right of light and air as apparent and continuous easement which they were enjoying at the time of severance The plaintiffs would, therefore, be entitled to the easement of light and air. But the question is whether by the proposed construction, the right to light and air is in any way affected. An open space of nine feet is expected to be

1. (1905) I L R 28 Mad. 495 . 15 M L J. 255
2. (1930) I L R 53 Mad 449 : 59 M.L J. 956 ; A I R. 1930 Mad 609.
3. A I R 1956 Mad 584
4. (1911) I L R 33 All. 467.
5 A I R 1930 All 560
6 A I.R 1937 Nag. 179.

left between the plaintiff's buildings and the proposed construction and its height itself will not be more than 10 to 12 feet. The balcony level in the building is about 14 feet. So, the proposed construction will not affect the passage of light and air to the upstairs portion of that building As far as the downstairs portion of the building is concerned, I think the open space of nine feet would be more than enough to provide sufficient light and air for the building of the plaintiffs. If at any future time the defendants put up any construction which will have the effect of appreciably diminishing the light and air enjoyed by the plaintiffs, the plaintiffs would then have a cause of action. The construction proposed at present does not in any way diminish the flow of light and air into the plaintiff's buildings. It follows that the conclusion of the Courts below on both the points is correct.

The second appeal is, therefore, dismissed with costs. No leave.

V.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE P. S. KAILASAM.

B. R. Venkatachalapathi .. *Petitioner**

v.

The Commissioner, H. R. and C. E. (Admn.) Department, Madras, and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 46, 47 and 49—"Otherwise ceases to be a trustee" in section 47 (3)—Meaning of—Trustee of non-listed temple appointed by Area Committee—If entitled to continue for the full term of five years even if it is listed in the meantime—Filling up of a casual vacancy—Procedure.

The term "otherwise ceases to be a trustee" in section 47 (3) of the Madras Hindu Religious and Charitable Endowments Act, 1959, should be given its plain and natural meaning. A trustee may cease to be a trustee due to various reasons, either by becoming disqualified or by operation of law, *viz.*, by the temple being listed under section 46 as in the instant case. It cannot be given a restricted meaning that a trustee ceases to be a trustee only by being disqualified under any of the clauses in section 25 of the Act.

There is no provision in sections 46, 47 or 49 which saves the term of the trustee of a non-listed temple appointed by the Area Committee, even after the temple is listed under section 45 Reading sections 46 and 47 together it is clear that when once a temple is listed the Commossioner, Hindu Religious and Charitable Endowments, is required to constitute a Board of Trustees and there is no provision for continuing the trustee appointed by the Area Committee, unless the trustee is appointed by the Commissioner afresh The plea, therefore, that when once a person is appointed as a trustee to a temple by the Area Committee, he is entitled to be in office for the full term of five years, in spite of the fact that the temple is listed in the meantime has to be rejected.

When a casual vacancy for the post of a trustee for a listed temple arises, the usual procedure is to notify the vacancy, call for applications and on the report of the authorities concerned to the Commissioner, appoint the trustee It is incumbent on the Commissioner in making the appointment to consider the comparative merits of the applicants An order of appointment of a trustee is in the nature of a quasi-judicial function and it is incumbent on the Commissioner to give reasons for such an appointment.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records of the 1st respondent relating to the proceedings in D.D. No. 47216/68 dated 16th November, 1968

* W.P. No. 4601 of 1968. 20th December, 1968

and further proceedings of the 1st respondent in R.C. No. 48057/68/A-1 dated 21st November, 1968 and quash the orders passed therein and all further proceedings pursuant thereto appointing respondents 2 to 6 as trustees of Sangameswaraswami Temple, Bhavani.

K. Alagiriswami, for Petitioner.

Government Pleader, *Manika K. Ramalingam, C. Chennappan* and *Palaniswami*, for Respondents

The Court made the following

ORDER.—The petitioner who is an unsuccessful applicant for the post of a trustee of Sangameswaraswami Temple, Bhavani town, prays for the issue of a writ of *certiorari* calling for the records of the Commissioner, Hindu Religious and Charitable Endowments, Madras relating to the proceedings in D D No 47216/68 dated 16th November, 1968 and R C No 48057/68/A-1 dated 21st November, 1968 and to quash the orders appointing respondents 2 to 6 as trustees.

The petitioner was appointed as one of the five trustees of Sangameswaraswami temple, Bhavani town for a period of five years in the year 1964 by the Area Committee Subsequently the temple was notified under section 46 of the Madras Hindu Religious and Charitable Endowments Act, 1959 as a listed temple. Applications were invited for appointment of trustees in pursuance of the notification under section 46 of the Act by the Commissioner in the exercise of his powers under section 47 The petitioner and others applied for being appointed as trustees. The Commissioner by his proceedings dated 16th November, 1968 appointed five persons as trustees, one of whom was Chinnappa Gounder, but the petitioner was not appointed. Chinnappa Gounder, who was appointed as a trustee, intimated his inability to function as a trustee, in person to the Commissioner of Hindu Religious and Charitable Endowments on 21st November, 1968, and on the same day the Commissioner appointed T. K Ramaswami Gounder, the 6th respondent in the vacancy caused by the resignation of Chinnappa Gounder.

The petitioner challenges the orders of the Commissioner dated 16th November, 1968 and 21st November, 1968. The attack on the order dated 16th November, 1968 is on the ground that, when the petitioner had been validly appointed by the Area Committee for a period of five years, he could not be removed till the expiry of that period Regarding the order dated 21st November, 1968, it is submitted that the Commissioner was in error in appointing the 6th respondent without following the procedure in filling up a casual vacancy and considering the merits and demerits of persons available for the appointment.

The petitioner was appointed as a trustee by the Area Committee under section 46 of the Act on 28th March, 1964 for a priod of five years. This period would normally expire on 27th March, 1969. But in the meantime on 17th July, 1967 the temple was listed and applications for appointment of fresh trustees were called for by the Commissioner, and the appointment of fresh trustees was made on 16th November, 1968 Section 49 of the Act provides that the provisions of sub-section (3) of section 47 shall apply to the trustee or trustees appointed by the Area Committee, as they apply to the trustee or trustees appointed by the Commissioner Section 47 (3) provides that every non-hereditary trustee appoined shall hold office for a term of five years, unless in the meanwhile the trustee is removed or dismissed or his resignation is accepted by the Commissioner or he otherwise ceases to be a trustee. As the provisions of sub-section (3) of section 47 are applicable to the trustees appointed by the Area Committee as provided under section 49 (2) of the Act, the submission of the learned Counsel for the petitioner is that the appointment by the Area Committee would be valid for a period of five years, unless in the meanwhile the trustee is removed or dismissed or his resignation is accepted by the Commissioner or he otherwise ceases to be a trustee Admittedly, the petitioner has not been removed or dismissed or his resignation accepted It was contended that he would not fall under the term " otherwise ceases to be a trustee " for that would be applicable only

to cases where the trustee is disqualified under section 26 (6) of the Act The term "otherwise ceases to be a trustee" should be given its plain and natural meaning. A trustee may cease to be a trustee due to various reasons, either by becoming disqualified or by operation of law It cannot be given a restricted meaning as contended by the learned Counsel for the petitioner that a trustee ceases to be a trustee only by being disqualified under any of the clauses in section 26 of the Act. Section 46 of the Act provides that the Commissioner shall publish a list of the religious institutions whose annual income calculated for the purposes of the levy of contribution under section 92 is not less than twenty thousand rupees When such a notification is made, section 47 becomes applicable Section 47 provides that where a religious institution included in the list published under section 46 has no hereditary trustee, the Commissioner shall constitute a Board of Trustees There is no provision in sections 46, 47 or 49 which saves the term of the trustee appointed by the Area Committee, even when the temple is listed under section 46. Reading sections 46 and 47 together, it is clear that, when once a temple is listed, the Commissioner is required to constitute a Board of Trustees and there is no provision for continuing the trustees appointed by the Area Committee, unless the trustee is appointed by the Commissioner afresh Further, the appointment under section 49 by the Area Committee is only for a non-listed temple, that is a temple for which the Area Committee could make the appointment. When the temple ceases to be one within the jurisdiction of the Area Committee and becomes a listed temple, it is taken out of the jurisdiction of the Area Committee, and the appointment of trustees can only be under section 47 Considering the relevant sections, I am satisfied that the plea of the petitioner that when once a trustee is appointed by the Area Committee, he is entitled to be in the office for the full term, in spite of the fact that the temple is listed in the meanwhile has to be rejected.

It was submitted that a special provision is made under section 47 by the amending Act XIX of 1968, wherein a proviso is added to continue the trustee appointed. I do not think that reference to any subsequent amendment would help in deciding the question at issue. In the result this contention will have to be rejected

It was next contended by the learned Counsel for the petitioner that under section 15 (1) (*a*) the Area Committee is the authority to appoint trustees for the temple within its jurisdiction The sub-section will only have to be read to reject this contention, for the sub-sction excepts the temples included in the list published under section 46 of the Act. The Commissioner, shall therefore have to call for applications for filling up the post of trustees in the listed temples coming within his jurisdiction and the trustees, who are functioning on being appointed by the Area Committee cannot to be trustees, unless they are appointed afresh by the Commissioner.

It was next contended by the learned Counsel for the petitioner that in any event the order of the Commissioner dated 21st November, 1968 cannot be sustained, as the procedure for filling up a causal vacancy was not followed. It may be remembered that Chinnappa Gounder resigned on 21st November, 1968 by presenting a letter in person to the Commissioner and immediately the Commissioner appointed the 6th respondent as a trustee in the place of Chinnappa Gounder. After the temple was listed applications for appointment of fresh trustees were called for and about 13 persons applied A report about these 13 applicants was submitted by the Assistant Commissioner and the Deputy Commissioner, to the Commissioner. Amongst the 13 applicants the Commissioner appointed five persons. The appointment takes effect from the date of appointment and does not depend upon the applicants accepting it or not, for the acceptance is presumed as the applications are considered after the persons apply for the post. When T. K. Chinnappa Goundar who was appointed a trustee, intimated his inability to discharge the functions of a trustee, a casual vacancy arose. When a casual vacancy arises, the usual procedure is to notify the vacancy, call for applications and on the report of the authorities for the Commissioner to appoint the trustee. In this case the plea on behalf of the

Commissioner is that he had the report regarding the 13 applicants for the five posts, and he selected one among the remaining applicants. But this is not the usual procedure for filling up a casual vacancy, for between the date on which the applications were invited originally and the date of falling of the casual vacancy, there may be other persons interested in applying for the posts and there is no justification for not filling up the casual vacancy in the usual manner after calling for the applications Apart from this objection, the learned Counsel for the petitioner submitted that, if only the Commissioner had looked into the records, he would have found that the 6th respondent was not a person fit to be appointed as a trustee He listed several acts of the 6th respondent, which, according to him would disqualify the 6th respondent from being appointed as a Trustee. He instanced the fact that the 6th respondent on certain occasions opened the hundi of a temple, of which he is the trustee, without notifying the concerned authorities and also the fact that certain lands were leased by him without a public auction being held. He also alleged that the 6th respondent was reported to be guilty of improper conduct towards the family of the temple staff. All these allegations are vehemently denied by the learned Counsel for the 6th respondent. Whether the 6th respondent is guilty of any acts which would render him not a fit person to be appointed as a trustee or whether these allegations were made by parties who are inimically disposed towards the 6th respondent cannot be gone into in this petition. But it is incumbent on the Commissioner in making the appointement to consider the comparative merits of the persons who are eligible for appointment as trustees and make the appointment. There is no indication that the Commissioner considered either any of the qualifications or the disqualifications of applicants, who were included in the list that was before him The order of appointment of the 6th respondent as a trustee is in the nature of a quasi-judicial function and it is incumbent on the Commissioner to give reasons for such an appointment. The order of the Commissioner which states "I hereby appoint T K. Ramaswami Goundar as trustee from the date of this order" does not at all throw any light regarding the consideration of the comparative merits of the applicants On these grounds the order of the Commissioner dated 21st November, 1968 appointing the 6th respodent as a trustee will have to be set aside The Commissioner will consider the vacancy caused by the resignation of Chinnappa Goundar as a casual vacancy, call for applications and proceed to make the appointment according to law.

In the result this writ petition is dismissed regarding the prayer for quashing the order of the Commissioner dated 16th November, 1968 and allowed so far as the Commissioner's order dated 21st November, 1968 is concerned.

No order as to costs.

V K. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR. JUSTICE A. ALAGIRISWAMI.

Kamatchi Ammal .. *Appellant**

v.

Athigamudaya Pillai and others .. *Respondents*

Civil Procedure Code (V of 1908), *section* 11, *Order* 22, *rule* 9—*Former suit abating on the death of plaintiff in that suit—Subsequent suit against plaintiff in the former suit or his legal representatives—Bar of* res judicata—*Applicability.*

Surely if the plaintiff whose suit has abated cannot again bring a fresh suit on the same cause of action and the earlier decision should be deemed to be a decision against him, he cannot get rid of the effect of the earlier decision just because he happens to be a defendant in a subsequent suit. Even in the subsequent suit where he is a defendant it should be held that he would be barred from agitating the same questions which he could have agitated in the earlier suit and which

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* S. A. No 1902 of 1964. 29th October, 1968.

because of the provisions of Order 22, rule 9 he is prohibited from agitating in a subsequent suit as a plaintiff The fact that he is merely a defendant in the subsequent suit does not seem to affect the principle embodied in Order 22, rule 9.

Jaysing v. *Gopal*, (1904) 6 Bom. L.R 638, dissented from; *Raju* v. *Ramchand*, A I.R. 1933 Lah 752, followed.

Appeal against the decree of the Sub-Court, Sivaganga, in A S. No. 157 of 1963, preferred against the decree of the District Munsif, Manamadurai, in O.S. No. 293 of 1961.

R Gopalaswami Iyengar, for Appellant.

N. K. Ramaswami, for Respondent

The Court delivered the following

JUDGMENT :—The plaintiff is the appellant. The suit property originally belonged to one Urkavalan Pillai, who settled it upon his wife, Kunjarathammal, under a document, Exhibit A-1, dated 19th August, 1924 Kunjarathammal and Urkavalan Pillai executed a possessory mortgage, Exhibit B-1, on 7th June, 1939, in favour of the first defendant. The suit out of which the second appeal arises was for redemption of this mortgage Defendants 2 to 6 are the sons of Urkavalan Pillai's brother, Arumugham Pillai Defendant-7 is a daughter-in-law of his. The plaintiff is a successor-in-interest of a purchaser from Urkavalan's wife under Exhibit A-2. Defendants 2 to 7 contended that the properties were the joint family properties of Urkavalan Pillai and their father, and that therefore Urkavalan Pillai had no right to settle them on his wife They also claimed that they were in possession for over the statutory period and perfected title by adverse possession. Both these points have been found against them.

There was an earlier suit, O S No. 211 of 1959, filed by Arumugham, for recovery of possession of the suit properties after declaring that the two alienations by Urkavalan's widow were void and against his reversionary interest Arumugham Pillai died and that suit was allowed to abate. The question therefore arises also whether the earlier decision would bar defendants 2 to 7 from questioning the alienation by Kunjarathammal The sale by Urkavalan's widow was in discharge of two earlier mortgages executed by herself and her husband, for Rs 150 received by her for the funeral expenses of her husband and Rs. 150 received by her in cash The settlement deed in her favour stated that she was to enjoy the property and not to alienate the property without reference to the settlor and that the settlor himself should not alienate the property without reference to the settlee The next question that arises therefore is whether after the death of Urkavalan Pillai the terms of the settlement deed would still bind his widow or she would become a holder of a widow's estate entitled to alienate the estate for legal necessity. I do not think that that question need be gone into in the view that I take of the effect of the earlier decision in O S No. 211 of 1959 Defendants 2 to 7 claimed only as the legal representatives of the plaintiff in O.S No. 211 of 1959.

The Privy Council in *Brij Indar Singh* v *Bala Kanshiram*[1], had stated that section 371 of the old Civil Procedure Code, corresponding to Order 22, rule 9 only hurts the plaintiff. Then they pointed out that an order abating a suit may be said to be really tantamount to a judgment in favour of the defendant. This observation is relied upon on behalf of the appellant But then this decision did not deal with a case of a plaintiff in an earlier suit being a defendant in a subsequent suit. In *Rahim Unnissa Begum* v *Srinivasa Aiyangar*[2], a Bench of this Court had to consider the effect on the right of parties in a subsequent suit, of the result of an earlier suit which had been allowed to abate In considering that question the Bench referred to the dictum of the Privy Council above mentioned and then stated that so long as

1. (1917) L.R 44 I A. 218 : 33 M L J. 486 (P.C.)
2. (1920) 38 M L J. 266.

the plaintiff is unable to vacate the judgment and so long as the defendant continues in possession he can plead against the plaintiff and those claiming under him that the order of abatement is conclusive of right to the property, and that the only course open to the legal representative if he wants to escape the abatement order is to apply for setting aside the abatement and so long as it is unreversed it would be binding on him The discussion is only about the effect of the abatement of the earlier suit when the plaintiff in the earlier suit or his legal representatives bring the subsequent suit But the Bench also referred to the decision in *Jaysing* v *Gopal*[1], wherein a Bench of the Bombay High Court held that where the legal representatives of the plaintiff, on whose death the suit abated, got into possession of the property they were entitled to resist the suit brought to oust them from possession, and that the previous order of abatement did not preclude them from setting up title If this decision of the Bombay High Court is correct, there is no doubt that in this case defendants 2 to 7 would, notwithstanding the abatement of the earlier suit brought by the father be entitled to set up their own title. What is urged on behalf of the respondents is that when the Bench of this Court after referring to this decision, in the next sentence say that accepting this judgment as rightly laying down the law it does not affect the present one, the Bench should be deemed to have accepted as correct the decision in *Jaysing* v *Gopal*[1] I do not think that this is correct. It only means that even if the Bombay judgment is accepted to be correct it did not affect the case before the Bench In any case the ratio of the decision of the Bench was not the same as in *Javsing* v *Gopal*[1], and therefore there is no decision of this Court which is binding on me and which could compel me to hold that where the previous suit has abated the plaintiff in that suit can in a subsequent suit against him plead that the decision in the earlier suit would not bar his defence The Lahore High Court in *Raju* v. *Ramachand*[2], has taken a view contrary to the Bombay view. The Lahore High Court does not refer to the decision in *Jaysing* v *Gopal*[1] They merely say that where the plaintiff cannot bring a fresh suit to establish his title he cannot resist the claim of the plaintiff (in the fresh suit) in spite of the definite finding in the earlier suit It appears to me that the decision of the Lahore High Court is more in accordance with the principles embodied in Order 22, rule 9 Surely if the plaintiff whose suit has abated cannot again bring a fresh suit on the same cause of action, and the earlier decision should be deemed to be a decision against him he cannot get rid of the effect of the earlier decision just because he happens to be a defendant in a subsequent suit Even in the subsequent suit where he is a defendant it should be held that he would be barred from agitating the same question which he could have agitated in the earlier suit and which because of the provisions of Order 22, rule 9 he is prohibited from agitating in a subsequent suit as a plaintiff. The fact that he is merely a defendant in the subsequent suit does not seem to affect the principle embodied in Order 22, rule 9 I am therefore of opinion that the decision of the Lahore High Court is preferable to the decision of the Bombay High Court Following the decision of the Lahore High Court I hold that defendants 2 to 7 are barred from raising the questions which the father of defendants 2 to 6 had sought to raise in the earlier suit in O S No. 211 of 1959 It follows therefore that the plaintiff is entitled to succeed in the suit

The appeal is accordingly allowed and the suit will stand decreed As the question at issue is rather a difficult one on which no authority of this Court is found I will order both the parties to bear their own costs in this Court Leave granted

V.K. *Appeal allowed.*

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1. (1904) 6 Bom. L.R. 638.
2. A.I R. 1933 Lah 752.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

The State of Madras, represented by the Collector of Madras, Madras-1. *Petitioner**

v.

T. M Oosman Haji & Co, Timber Merchants, Basin Bridge Road, Madras, and others . *Respondents*

Government Grants Act (XV of 1895), *section* 3 *and Madras City Tenants Protection Act, (III of* 1922), *section* 1 (b) *and* 7 (a)—*Whether section* 3 *of the Government Grants Act prevails over provisions of Madras City Tenants Protection Act—Application by tenant, against landlord, State, for fixation of fair rent—Maintainability of.*

The Preamble of the Government Grants Act gives an indication as to the scope and purview of the Act and it can be looked into to correctly understand the provisions of the Act. The Government Grants Act was passed not only to settle the doubts which had arisen as to the effect of the Transfer of Property Act, 1882, but also to remove any doubts with regard to the power of the Government to impose limitations and restrictions upon grants and other transfers of lands made by it, or under its authority. Section 2 of the Act deals with exemptions as regards the Crown grants from the provisions of the Transfer of Property Act, and thus it gives effect to the first object mentioned in the Preamble. Section 3 of the Act provides that Crown grants should take effect according to their tenor, notwithstanding any law to the contrary. There is no need for any such provision if the law referred to in section 3 is only the Transfer of Property Act

A Legislature can by express words, or by necessary implication, take away the effect of section 3 of the Government Grants Act while enacting a particular legislation. But for section 3 of the Government Grants Act, the Madras City Tenants Protection Act would apply to tenancies in respect of Government lands. The express provision contained in section 3 of the Government Grants Act, taken along with the absence of any provision in the Madras City Tenants Protection Act extending the Act to Government lands, either expessly or by necessary implication, can only lead to one inference, namely, that the provisions of the Madras City Tenants Protection Act cannot be invoked contrary to the terms of the Government grants.

The terms of section 3 of the Government Grants Act can certainly be relied on as specifically exempting Government grants from the operation of the Madras City Tenants Protection Act in the absence of any provision, either express or implied, extending the Act to Government grants. In view of section 3 of the Government Grants Act, the local Legislature did not deem it necessary to include Government grants while amending the Act by introducing the proviso to section 1 (3) of the Act giving exemption to lands of the Corporation and certain other public bodies.

Held, section 3 of the Government Grants Act prevails in the instant cases and the State is therefore not bound by the provisions of the City Tenants Protection Act. The fair rent application filed by the tenants are not maintainable against the landlord, the State.

C.R P Nos. 1565 *and* 1799 *of* 1963.—Petitions under section 115 of Act V of 1908 praying the High Court to revise the decree of the Principal Judge, City Civil Court, Madras, dated 2nd February, 1963 and passed in A.S Nos 272 and 273 of 1960 (O P Nos. 114 and 115 of 1959 Assistant Judge-*cum*-Registrar, City Civil Court, Madras).

C.R.P Nos. 962 *of* 1965 *and* 1297 *of* 1966—Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Additional Judge, City

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* C. R. P. Nos. 1565 and 1799 of 1963, 962 of 1965 and 1297 of 1966 — 6th January, 1969.

Civil Court, Madras, dated 31st August, 1964 and made in C.M A.Nos. 9 and 10 of 1964 (O P. Nos. 315 and 316 of 1960 on the file of the Third Assistant Judge, City Civil Court, Madras).

The Additional Government Pleader, for Petitioner and *R. Parthasarathy* and *S. F. Rehman* and *T. Chengalvaroyan*, for Respondents in C.R P. Nos. 1565 and 1799 of 1963.

M. S. Sundararajan, for Petitioners and The Additional Government Pleader and T. *Chengalvaroyan*, for Respondents in C.R.P. No. 962 of 1965 and 1297 of 1966.

The Judgment of the Court was delivered by

Sadasivam, J—These Civil Revision Petitions have been directed by the learned Chief Justice to be posted before this Division Bench as they involve two questions of law of some importance, namely, whether section 3 of the Government Grants Act of 1895 (originally called the Crown Grants Act) prevails over the provisions of the Madras City Tenants Protection Act, III of 1922, and whether the State of Madras is bound by the provisions of the Madras City Tenants Protection Act, unless this is expressly stated to that effect in the Act.

These Civil Revision proceedings arise out of petitions filed by four timber merchants carrying on business in Basin Bridge Road, Madras, for fixation of fair rent under section 7 (*a*) of the Madras City Tenants Protection Act, 1922. It is an undisputed fact that the lands on which the timber depots are kept belong to the State of Madras and they have been leased out by the Corporation to the several timber merchants. The Government allowed the Corporation to lease their lands in the Basin Bridge Road to timber merchants, subject to their approval, on the condition that 50 per cent. of the rent realised should be paid over by the Corporation to the Government. The rents collected from the timber merchants were increased from time to time, and finally, at the beginning of 1953, the timber merchants were informed that the lease would be renewed only on condition of their paying a rent of Rs. 50 per ground, though the Standing Committee of the Corporation itself had suggested only Rs. 35 per ground. Oosman Hajee & Co. and M/s. S N. Vijayaraghavachariar succeeded in the Courts below in invoking their jurisdiction for fixation of fair rent and the State has preferred C R.P. Nos. 1565 and 1799 of 1963. But in the other two revision petitions filed by M/s. Sudarsanam Iyengar & Sons, the Courts below took the opposite view that the provisions of the City Tenants Protection Act cannot be invoked for fixation of fair rent, in respect of the lands owned by the Government.

It was urged on behalf of the State, in the Courts below that the Corporation of Madras acted only as the agent of the Government in leasing the lands In the appeals preferred by M/s. Sudarsanam Iyengar & Sons to the City Civil Judge, Madras, there is a specific finding that ' the position which the Corporation occupies is only that of an agent, subject to the control of the Government with regard to the acceptance of the terms of the lease '. Even in the appeals preferred by the State of Madras against Oosman Hajee & Co., and M/s Vijayaraghavachariar, the appellate Court has found in the penultimate paragraph of its judgment that ' all that the Government Order provides is that the Corporation was entitled as the ' agent of the State of Madras to lease the properties in question on terms approved by the Collector', and it is in this view, the learned Principal City Civil Judge has considered the scope and effect of section 3 of the Government Grants Act. Thus the finding of the lower appellate Court in all these cases that the Corporation acted as the agent of the Government in leasing the lands of the Government to the timber merchants is justified on the evidence on record and it correctly respresents the jural relationship between the parties.

The common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is not necessarily bound by statute law which binds the subject. This is further reinforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication

or unless, the statute being for the public good, it would be absurd to exclude the King from it It was pointed out in *Director of Rationing and Distribution* v. *Corporation of Calcutta*[1], that this was the law applicable to India also until the advent of the Constitution It has been held in the above decision that the rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms, or by necessary implication, is still good law. This was relied on and followed in *State of West Bengal* v. *Union of India*[2], *State of Punjab* v. *O G B. Syndicate Ltd* [3], and *V S R & Oil Mills* v. *State of Andhra Pradesh*[4] But in *State of West Bengal* v. *Corporation of Calcutta*[5], the above decision in *Director of Rationing and Distribution* v. *Corporation of Calcutta*[1], was overruled and the minority view of Wanchoo, J., in that decision was approved It has been held in that decision that the rule of construction that the King is not bound by a statute unless he is expressly named or brought in by necessary implication, which was accepted by the Privy Council in interpreting statutes *vis-a-vis* the Crown is inconsistent with and incongruous in the present set up and that in the context of modern notions of the functions of a Welfare State, there is no sufficient reason to justify any distinction in the application of the rule of interpretation of statutes and that the general Act applies to citizens as well as to State unless it expressly or by necessary implication excepts the State from its operation. It is pointed out in that decision that the State can make an Act, if it chooses, providing for its exemption from its operation and that though the State is not expressly exempted from the operation of an Act, under certain circumstances, such an exemption may necessarily be implied. This decision was followed in the later Supreme Court decision in *Union of India* v *Jubbi*[6], where it has been held that " a statute applies to State as much as it does to a citizen unless it expressly or by necessary implication exempts the State from its operation ".

The Madras City Tenants Protection Act, as it originally stood, was applicable to the tenants in the City of Madras and there is provision in the Act as amended by Madras Act XIX of 1955, to extend it to other municipal towns and specified villages within five miles from the City of Madras, or municipal towns, by Government notification In 1960, a proviso was added to section 1 (3) of the Act exempting the tenancies of lands owned by the Corporation of Madras in the City of Madras and certain other public bodies, such as the Municipal Council, Panchayat Union, District Board and the Board of Trustees constituted under the Madras City Improvements Trust Act. But there is no such exemption in the case of lands owned by the Government.

The decision of Ramakrishnan, J , in *M. Murugesan* v. *The Collector of Madras and two others*[7], throws some light on this aspect of the case It related to proceedings taken by the Government under the Land Encroachment Act to evict dwellers of huts mainly occupied by employees in the harbour in the locality called Kanniappa Nagar Colony, in pursuance of a scheme to provide an alternative space for their occupation, as the Government land was required for the purpose of the Port Trust to extend the Harbour. The hut dwellers of Kanniappa Nagar Colony relied on the acts of the Corporation and the Government as showing that their occupation of the huts was authorised and claimed the benefit of the provisions contained in the City Tenants Protection Act The fact that when the proviso to section 1 (3) of the Act was added in 1960 no attempt was made to give any similar protection to Government land, was relied on to show that the City Tenants Protection Act could not be invoked in respect of Government lands The learned Judge has observed that the reason for the amendment was to extend the benefit which the Crown enjoyed not only by virtue of the common law principle of saving Crown lands from the operation of the statute, but also by reason of the specific provisions of the Government Grants Act, 1895, to the lands of the Corporation and certain other authorities.

1 (1961) 1 S C R 158 · (1961) 1 An W R (S C) 88 (1961) M L J (Crl) 225 · (1961) 1 M L J. (S C) 88 : (1961) 1 S C J 406 · A I R 1960 S C 1355

2. (1964) 1 S C R 371 : A I R 1963 S C 1241.

3. (1964) 5 S C.R. 387 : A I R 1964 S C. 669.

4 (1965) 1 S C J 318 : (1965) 1 An W.R. (S C) 31 (1965) 1 M L J (S.C) 31 : (1964) 7 S C R 456 · A I R 1964 S C 1781

5 (1967) 2 S C R 170 A I R 1967 S C 997.

6 (1968) 2 S C J 197 . A I R 1968 S C 360.

7. Writ Petition No 45 of 1961.

It is true that in so far as this decision relies on *Director of Rationing and Distribution* v. *Corporation of Calcutta*[1], the authority has been shaken by the subsequent decisions referred to above. But the interpretation of sections 2 and 3 of the Government Grants Act, 1895 given in that case supports the contention of the learned Government Pleader.

The decision in these petitions depends on a proper construction of section 3 of the Government Grants Act If the terms of the grant by the Government by way of leases of their lands through the Corporation are to take effect according to their tenor by virtue of section 3 of the Government Grants Act, notwithstanding any law, statute, or enactment to the contrary, the City Tenants Protection Act cannot be invoked by the tenants for the fixation of fair rent. The Preamble of the Government Grants Act gives an indication as to the scope and purview of the Act and it can be looked into to correctly understand the provisions of the Act. The Government Grants Act was passed not only to settle the doubts which had arisen as to the effect of the Transfer of Property Act, 1882, but also to remove any doubts with regard to the power of the Government to impose limitations and restrictions upon grants and other transfers of lands made by it, or under its authority. Section 2 of the Government Grants Act deals with exemptions as regards the Crown grants from the provisions of the Transfer of Property Act, 1882, and thus it gives effect to the first object mentioned in the Preamble. Section 3 of the Act provides that Crown grants should take effect according to their tenor, notwithstanding any law to the contrary. There is no need for any such provisions if the law referred to in section 3 is only the Transfer of Property Act In *Secretary of State for India* v. *Raja Parthasarathy Appa Rao*[2], it is observed that " looking at the Preamble and considering the purpose of the Act it cannot be doubted that the Act was rather declaratory in its nature than enabling or enacting ", that it had to be enacted so says the Preamble, because doubts had arisen as to the extent and operation of the Transfer of Property Act, 1882 and that " taking the terms of the Crown Grants Act, the inference seems to be irresistible that prior to the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or under any of the conditions whatsoever "

Haji Mahamad Nasurdin Khan Bhadur v. *Egambara Mudaly*[3], relates to a case where the Crown made a grant of a village for the maintanance of a tomb. It was held in that decision that having regard to section 3 of the Crown Grants Act, the validity of the grant could not be questioned on the ground that it created an estate not recognised by the Mohamedan Law In *Kallingal Moosa Kutti* v. *The Secretary of State*[4], a Bench of this Court has held that under sections 2 and 3 of the Crown Grants Act, the Government has power to impose restrictions in a lease made by it—a power which is not affected by the provisions of the Malabar Compensation for Tenants' Improvements Act In *Ullattuthedi Choyi* v. *Secretary of State of India*[5], the above decision has been followed and it has been held that " where under the terms of a lease granted by the Crown the lessee agrees to surrender the demised property on six months' notice, he cannot resist a suit in ejectment by the Crown after the requisite notice, on the ground that he must be paid the value of his improvements under the Malabar Compensation for Tenants' Improvements Act ". In *Murugesa Gramani* v. *The Province of Madras*[6], it has been held that the Crown Grants Act prevails over the City Tenants Protection Act and that being so, the terms of the grant of lease given by the Government to the appellant in that case have to be enforced.

There are decisions of other High Courts also with regard to the interpretation of section 3 of the Government Grants Act to the same effect In *Gaya Prasad* v. *Secretary of State*,[7] it has been held that in respect of a Crown grant the Crown is not bound by any of the sections of the Tenancy Act, or the Transfer of Property Act or

1 (1961) 1 S C R 158 (1961) 1 S C J. 406 (1961) 1 An W R (S C) 88 (1961) 1 M L J (S C) 88.
2. (1926) 50 M L J. 699 : I.L R. 49 Mad. 349 at 379 and 380
3 (1907) 2 M L T 55
4 (1920) 37 M L J 332 I L R. 43 Mad 65.
5 (1921) 41 M L J 494
6 (1946) 2 M L J 171.
7. A.I R. 1939 All. 263.

the Contract Act and that regard must be had by the Courts to the terms of the grant. This decision throws light on the construction of section 3 of the Crown Grants Act The appellant in that case had purchased the property originally owned by the Government from the grantee and contrary to the terms of the grant made by the Government, he put up a construction after obtaining a licence from the municipality It was urged that the municipality acted as the agent of the Government and that the Government was bound by the Act of the municipality and reliance was placed on section 188 of the Contract Act. It was held that the section of the Contract Act on which the appellant relied had no binding effect on the Government for the simple reason that it could not override section 3 of the Crown Grants Act In *State of Anddra* v. *Abhishekam*[1], it has been held that the effect of section 3 of the Government Grants Act is that when a grant has been made by the Government, it is not, with reference to that grant, bound by any of the sections of either the Tenancy Act, or the Transfer of Property Act, or the Contract Act, or any other law for the time being in force and it, therefore, follows that any grant made has to be construed in accordance with the tenor of the grant and the grant will certainly be regulated in accordance with such tenor.

We shall proceed to consider whether the decision of the Judicial Committee in *Thakur Jagannath Baksh Singh* v *The United Provinces*[2], which has been referred to with approval in *Collector of Bombay* v *Nusserwanji*[3], has taken away the authority of the above decisions The relevant passage in the decision of the Privy Council at page 34 is as follows —

> " Their Lordships ought to refer in passing to the Crown Grants Act, 1895 of which section 3 was relied on by the appellant That section runs .
>
> ' All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid (*i e*, one made by the Crown) shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.'
>
> These general words cannot be read in their apparent generality The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context and could not be construed to extend to the relations between a Sanad holder and his tenants. Still less could they be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act."

It is clear from the above passage that their Lordships of the Privy Council ' in passing ' referred to section 3 of the Crown Grants Act. Their observations should be read in the light of the decision in that case The appellant in that case put forward a claim that the U.P Tenancy Act, 1939, is *ultra vires* of the Provincial Legislature He claimed that the Act created rights and interests in land in favour of persons other than the grantee contrary to the Sanad granted by the Crown in favour of his predecessor-in-title and thus derogated from the terms of the Crown grant because it modified or curtailed the rights conferred by the Crown. Thus the real question involved in that case was about the competence of the Legislature to enact laws which would affect a Crown grant. In *A Subhan* v *Union of India*[4], it has been held that section 3 of the Crown Grants Act has no overriding effect on section 3 of the West Bengal Estates Acquisition Act and that a competent Legislature can legislate so as to vary the effect of a Crown grant and that section 3 of the Crown Grants Act cannot limit the statutory competence of a State Legislature to legislate on a subject assigned to it by the Constitution The principle is illustrated by the Zamindar Abolition Act and similar legislation

The Privy Council referred to the first part of the Preamble that it was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act and stated that the general words of section 3 could not be read in their apparent generality and must be read with reference to the general context and could not be

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1 A I R 1964 A P 450
2 (1946) 2 M L J 29 L R 73 I A. 123 (1946) F C R 111 . (1946) F L J 88
3 (1955) S C J 339 (1955) 1 S C R 1311: A I R. 1955 S C 298
4 A I R. 1966 Cal 570.

construed to extend to the relations between a Sanad holder and his tenants. Thus as between the Government and the grantee, the terms of the grant would prevail notwithstanding any other law to the contrary It is true, as pointed out in the said Privy Council decision, and the Calcutta decision just referred to that section 3 of the Government Grants Act cannot be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act Thus a Legislature can by express words, or by necessary implication, take away the effect of section 3 of the Government Grants Act while enacting a particular legislation But for section 3 of the Government Grants Act, the Madras City Tenants Protection Act would apply to tenancies in respect of Government lands The express provision contained in section 3 of the Government Grants Act, taken along with the absence of any provision in the Madras City Tenants Protection Act extending the Act to Government lands, either expressly or by necessary implication, can only lead to one inference, namely, that the provisions of the Madras City Tenants Protection Act cannot be invoked contrary to the terms of the Government grants.

It is true in the decision in *Collector of Bombay* v. *Nusserwanji*[1], the relevant passage of the Privy Council decision construing section 3 has been quoted with approval. But we have already explained the scope of the decision in the Privy Council case. The respondent in the above Supreme Court case claimed immunity from assessment by virtue of a transfer made by the Government in favour of his predecessor-in-title. The lands were originally acquired by the Government for the purpose of the B B. and C I Railway under the provisions of the Land Acquisition Act and as they were no longer required for the purpose of the railway, they were sold by the Governor-General to the predecessor-in-title of the respondent. The contention in that case was that as the grant is of a freehold estate without any reservation, it must, to take effect according to its tenor, be construed as granting exemption from assessment to revenue It is held in that decision that section 3 of the Crown Grants Act must be construed in the light of the Preamble and so construed, it cannot have any bearing on the rights of the parties It is further pointed out in that case that the section only enacts that "all provisions, restrictions, conditions and limitations over" in any grant or transfer shall be valid and take effect according to their tenor and that what is relied on is not any 'provision, restriction, condition or limitation over' in the relevant document Exhibit 'A' which according to its tenor entitles the respondent to hold the lands rent-free, but the absolute character of the interest conveyed under Exhibit 'A' and therefore, section 3 does not in terms apply. The deed in that case conveyed the lands to the purchasers absolutely 'with all rights, easements and appurtenances whatsoever,' to be held 'for ever' as in the case of conveyances of land in fee simple. It did not however recite that they are to be held revenue-free. Thus the observations of the Privy Council in *Thakur Jagannath Baksh Singh* v. *The United Provinces*[2], cited with approval in the Supreme Court decision, cannot be taken as throwing any doubt on the correctness of the decision of this Court and the other Courts as regards the scope of section 3 of the Government Grants Act.

The terms of section 3 of the Government Grants Act can certainly be relied on as specifically exempting Government grants from the operation of the Madras City Tenants Protection Act in the absence of any provision, either express or implied, extending the Act to Government grants. We are inclined to agree with the view of Ramakrishnan, J, in *M. Murugesan* v. *The Collector of Madras and two others*[3], that in view of section 3 of the Government Grants Act, the local Legislature did not deem it necessary to include Government grants while amending the Act by introducing the proviso to section 1 (3) of the Act giving exemption to lands of the Corporation and certain other public bodies.

The learned Government Pleader brought to our notice the unreported decision of Natesan, J, in *Nallanna Gounder* v *Muthuswami Gounder and another*[4],

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1 (1955) S C J 339 (1955) 1 S C R 1311 : A I R 1955 S C 298
2. (1946) 2 M.L.J. 29. (1946) F.C.R. 111 : (1946) F L J 88 L R 73 I A 123
3 W P No 45 of 1961.
4. S.A No. 482 of 1964.

where a different view of section 3 of the Government Grants Act was taken in deciding whether the State can claim immunity and exemption from the provisions of the Madras Cultivating Tenants Protection Act in respect of agricultural lands of the Government by virtue of section 3 of the Government Grants Act. In the case before the learned Judge, a lessee of agricultural land from Government sought to rely upon the provisions of the Madras Cultivating Tenants Protection Act and the State met it by putting forward a claim to immunity and exemption from the provisions of that Act, by reason of the Government Grants Act The learned Judge held, firstly, that the plaintiff in the suit would be a cultivating tenant within the meaning of the Madras Cultivating Tenants Protection Act and that if the Act should apply, he could not be evicted from his holding The State was undoubtedly the landlord and but for the claim to immunity by reason of the Government Grants Act, section 3 of the Madras Cultivating Tenants Protection Act would afford protection to the tenant against eviction The learned Judge examined the provisions of the Government Grants Act He referred to the decisions already cited by us earlier in this judgment. He cited the observation of the Privy Council in *Thakur Jagannath Baksh Singh* v *The United Provinces*[1], that the words in section 3 of the Government Grants Act " cannot be read in their apparent generality " and the observations of the Supreme Court in *Collector of Bombay* v *Nasserwanji*[2] The learned Judge construed the observation that the general words in section 3 cannot be read in their apparent generality to mean that the scope of section 3 of that Act was limited It seems to us that the observations both of the Privy Council and the Supreme Court cannot be divorced from the context in which they were made In the Privy Council decision the validity of the United Provinces Tenancy Act, as enacted by the Provincial Legislature was questioned in so far as it affected the rights conferred upon a grantee under a sannad The contention then was that since under the terms of the grant it was open to the sannad-holder to deal with the land and the tenancy as he liked, the impugned legislation, in so far as it interfered with his right to deal with his tenants in any way was contrary to the terms of the grant The Judicial Committee pointed out that the legislative power could not be attacked and the statute regulating the relations between the landlord and the tenant, though it might affect or diminish the rights which the landlord possessed earlier, did not in any way run contrary to section 3 of the Government Grants Act By making a grant of that description, the Legislature did not deprive itself of any power to legislate within the scope of its authority, and the contention that by reason of the sannad, the pre-existing relations between the sannad-holder and his tenants could not be interfered with by legislation of this kind was repelled, and it is in that context that the Judicial Committee observed that the words of section 3 of the Government Grants Act should be read with reference to the context Nor do the observations of the Supreme Court in the next case referred to above lead to a different conclusion After quoting the passage from the Supreme Court decision, Natesan, J , proceeded to say that " the Government Grants Act thus being unavailable, the State sought to stand on the archaic prerogative and immunity of the Crown from the operation of the statutes . " and proceeded to consider whether under the general law the Crown was not bound by any statute, unless the statute expressly or by clear implication so bound it. We are unable to subscribe to the view taken by our learned brother that the Government Grants Act became ' unavailable ' solely by reason of the observations of the Privy Council and the Supreme Court. We have already pointed out that under the law as it stands at present, the State is bound by any legislation, unless it is expressly or by necessary implication excluded from the operation of that statute Undoubtedly, there is such a piece of legislation, that is, the Government Grants Act, which does expressly exclude the Government from the operation of statutes in relation to certain matters covered by that piece of legislation In effect, the view of Natesan, J , would appear to be that the two decisions, that of the Privy Council and of the Supreme Court, have virtually destroyed the basis of the Govern-

1 (1946) F C R 111 : (1946) F L J 88 . L.R 73 I.A. 123 (1946) 2 M L J 29.

2 (1955) S C J 339 : (1955) 1 S C R. 1311 : A I.R 1955 S C. 298.

ment Grants Act, and that in so far as transactions dealt with by that Act are concerned, the Government by reason of the provisions contained in that Act cannot claim immunity from the operation of any other statute We are unable to agree in the view taken by our learned brother that the earlier decisions of this Court in *Murugesa Gramani* v *Province of Madras*[1], *Ullattuthedi Chovi* v *Secretary of State for India*[2] and *Kallingal Moosa Kutty* v *The Secretary of State for India*[3], may not be good law after the decisions of the Judicial Committee and the Supreme Court cited above Neither expressly nor by necessary implication does the Government Grants Act either stand repealed or has fallen into obsolescence We hold that it is open to the State to put forward successfully the contention that the express stipulation found in the terms of the grant, such as that of the lessee should surrender possession after the expiry of the term of demise etc can take effect, notwithstanding the provisions of the Madras Cultivating Tenants Protection Act It is also our view that it is not necessary for the Madras City Tenants Protection Act to contain any provision excluding the State from its operation, for such an exclusion from the operation of any particular enactment may be found in a different enactment covering the same field In so far as the Madras City Tenants Protection Act provides for the control over the eviction of cultivating tenants, though the relevant section excluding its operation in the case of lands belonging to certain specified bodies are concerned does not expressly refer to the exclusion of lands belonging to the State, the Government Grants Act confers that exclusion

We therefore find that section 3 of the Government Grants Act prevails in the instant cases and the State is therefore not bound by the provisions of the City Tenants Protection Act It should follow that the fair rent petitions filed by the respondents in C R P Nos. 1565 and 1799 of 1963 and the petitioners in C R P. Nos 962 of 1965 and 1297 of 1966 in the City Civil Court are not maintainable against the landlord, the State

They are accordingly dismissed, but in the circumstances, there will be no order as to costs.

S.V.J. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P S. KAILASAM

O Chinnaswamy Thevar and another . *Petitioners**

v.

The Executive Officer, Sree Meenakshi Sundareswarar etc, Devasthanam, Madurai .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *sections* 45, 56 *and* 118—*Temple servant—Disciplinary action against —Power in the trustees only—No power in the Executive Officer—Writ against Executive Officer dismissing temple servant—Competency.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 49 *and* 67

Under section 56 of the Act of 1959, the servants of the temple, are punishable only by the trustees of the temple, in the manner prescribed under the Act and not by the Executive Officer of the temple The proviso to section 67 (1) lays down that the Commissioner shall assign to the Executive Officer only such powers and duties as appertain to the administration of the endowments of the religious institution The proviso rules out conferment of any power of taking disciplinary action against the temple servants Section 49 of the Act of 1951 which corresponds to section 56 of the Act of 1959 empowers the trustees of religious institutions to take disciplinary action against the temple servants Section 118 of Act of

1. (1946) 2 M L J 171
2. (1921) 41 M L J 494
3. (1920) I L R. 43 Mad 65 37 M L J 332.

* W.P. Nos 802 and 803 of 1966. 21st November, 1968.

1959 which saves rules made etc under the old Act cannot be availed of, as the Commissioner cannot validly empower the Executive Officer to take disciplinary action against temple servants under section 67 of Act of 1951 or under section 45 of the Act of 1959 The only authority, therefore, is the trustees, who can take action under the old Act as well as under the new Act. The order of the Executive Officer dismissing the temple servants would be without jurisdiction and will have to be quashed

The contention that a writ may not issue against the Executive Officer as he is not a person in public authority, cannot avail, because no temple servant can be removed except under the provisions of the Act.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records connected with the order passed by the Executive Officer, Sree Meenakshi Sundareswarar etc, Devasthanam, Madurai, dated 4th March, 1966 and made in his No 4957/65-1 removing the petitioners in these petitions from service and quash the said order

G Desappan, for Petitioners.

S. T. Ramalingam for *G Ramanujam* and *K. Gopalaswami*, for Respondent

The Court made the following

ORDER —These writ petitions are filed by two persons employed in Sri Meenakshi Sundareswarar etc, Devasthanams, Madurai The charge against the petitioners was that they acted in an indisciplined manner by signing a memorandum given to a political leader, without obtaining permission, regarding the administration of the temple, and by attacking the administration and the chairman of the board of trustees without any basis in the memorandum In Writ Petition No 803 of 1966 the petitioner was also charged for having written a letter to the editor and getting the memorandum published in an issue of Kannagi on 17th October, 1965 An enquiry was conducted by the Executive Officer. The petitioners in both the writ petitions were found guilty of the charges and they were dismissed from service by the Executive Officer. In these writ petitions the learned Counsel for the petitioners submitted that the Executive Officer is not the authority empowered to punish the petitioners and as such the entire proceedings are void Section 56 of the Madras Hindu Religious and Charitable Endowments Act, 1959 provides that all office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not be controlled by the trustee, and the trustee may, after following the prescribed, procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause. 'Religious institution' means a math, temple or specific endowment 'Temple' is defined as a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worship It is not denied that Sri Meenakshi Sundareswarar, etc. Devasthanams is a temple The petitioners, therefore, will be servants coming under section 56 of the Act and punishable only by the trustee in the manner prescribed under the Act.

On behalf of the respondents it was submitted that under Order—10, dated 8th January, 1953, issued by the Commissioner, Hindu Religious and Charitable Endowments, in exercise of the powers vested in him under section 67 (2) of the Act XIX of 1951, the Executive Officer is authority competent to take disciplinary proceeding against the servants of the temple and that the above order continues in force by virtue of section 118 of the Act XXII of 1959 Section 67 (1) of Act XIX of 1951 provides that the Executive Officer shall hold office for such period as may be fixed by the Commissioner and he shall exercise such powers and perform such duties as may be assigned to him by the Commissioner. The proviso to the

section says that the Commissioner shall assign to the Executive Officer only such powers and duties as appertain to the administration of the endowments of the religious institution The proviso rules out conferment of any power of taking disciplinary action against the temple servants as the power that can be assigned to the Executive Officer is only with regard to the administration of the endowments of the religious institution Section 49 of Act XIX of 1951 which corresponds to section 56 of Act XXII of 1959 empowers the trustees of religious institutions to take disciplinary action against temple servants Section 118 of Act XXII of 1959 which saves rules made, notifications or certificates issued, orders passed, decisions made, proceedings or action taken, schemes settled under the old Act cannot be availed by the respondent, as the Commissioner cannot validly empower the Executive Officer to take disciplinary action against temple servants under section 67 of Act XIX of 1951 or under section 45 of Act XXII of 1959 The only authority, therefore, is the trustee, who can take action both under the old Act as well as under the new Act The order of the Executive Officer is therefore without jurisdiction and will have to be quashed.

It was sought to be contended that a writ may not issue against the Executive Officer, as he is not a person in public authority This contention cannot be accepted, because no temple servant can be removed except under the provisions of the Hindu Religious and Charitable Endowments Act

In the result, these writ petitions are allowed and the order of dismissal is set aside The trustee is at liberty to take any action, which he may deem fit in accordance with the provisions of law. No order as to costs.

V.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
PRESENT :—MR JUSTICE A. ALAGIRISWAMI.

Rangaswamy and another .. *Appellants.**

Penal Code (XLV of 1860), sections 100, 304, Part I and 324—Accused causing injury to the deceased in order to escape from his hold—Act of the accused, if falls under section 304, Part I

The accused 1, in order to escape from the hold of B (deceased) and before being caught by P Ws 1 and 2 inflicted an injury on the deceased with an ordinary knife which resulted in the death of B, the deceased In this case if the stab had been a little this way or that, death might not have resulted and at the worst accused 1 would have been guilty only under section 324, Indian Penal Code But in the circumstances where the act of accused 1 was merely with the intention of escaping, though technically the matter may fall under section 304 (Part 1), Indian Penal Code, a very mild sentence would serve the interest of justice in this case

Appeal against the Judgment of the Additional Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore in Sessions Case No 252 of 1965

B Sriramulu, for Appellant

Calvin Jacob, for Public Prosecutor, for State.

The Court delivered the following

JUDGMENT —The two appellants were tried before the learned Additional Sessions Judge, Coimbatore, for offences under section 302, Indian Penal Code, and 324, Indian Penal Code, respectively The first accused was found guilty under section 304 (Part I) Indian Penal Code and the second accused under section 324, Indian Penal Code. The first accused was sentenced to undergo rigorous imprisonment for five years and the second accused was sentenced to imprisonment till rising of Court and a fine of Rs. 200 in default to rigorous imprisonment for six weeks

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* Cr.A No 205 of 1966. 8th December, 1967.

There seems to have been some slight trouble between the parties before the occurrence But on the day in question accused 1 and 2 and another Arumugham were returning from the cinema after witnessing the first show When they were so returning, the deceased as well as a number of people met them on the way and during the course of that meeting the deceased is said to have caught hold of accused 1's shirt. The deceased also seems to have asked P Ws 1 and 2 to catch accused 1 and tie him up. The evidence in this case has been elaborately considered by the learned trial Judge and though he has also referred to the defence suggestion that the prosecution party went to meet the accused well prepared for that encounter, the learned Judge has neither accepted that suggestion, nor rejected it. As admittedly accused 1 and 2 and Arumugham were returning from the cinema, they could not have expected that the prosecution party would either meet them on the way or try to attack them. They could, certainly, not have been prepared for any attack on them or to attack the prosecution party. There is no doubt, however, that the finding of the learned Sessions Judge, that it was accused 1 that stabbed the deceased, is amply borne out by the evidence The argument advanced before me in this Court is confined merely to this, that accused 1 cannot be said to have exceeded the right of private defence It is suggested that the case would come either under clause *secondly*, or *fifthly* or clause *sixthly* of section 100, Indian Penal Code The learned Sessions Judge has dealt with this question in this form. He observed as follows :

> " Therefore, it is clear that A-1 has stabbed Bhadrappan only after Bhadrappan caught hold of A-1's shirt and asked P Ws 1 and 2 to catch A-1 and tie him up. P W. 3 has stated that the stabbing by A-1 was most sudden and unanticipated. Therefore, there is considerable force in the argument of the defence Counsel that even if the entire prosecution case were to be believed A-1's act would only amount to one done in exercise of a right of private defence or exceeding the right of private defence A-1 should have legitimately apprehended some harm at the hands of Bhadrappan and his people and it is in such circumstances that he must have inflicted the stab on Bhadrappan. However, A-1's act cannot be entirely covered by the right of self-defence It is not a case where Bhadrappan or any of his people were armed with deadly weapons which would have put A-1 in instantaneous fear of death or grievous hurt to himself The act of A-1 therefore would clearly amount to exceeding of the right of private defence. The fact that A-1 has inflicted only a single stab would indicate, that his intention was to free himself from Bhadappan's hold and run away before being caught by P Ws. 1 and 2. In such circumstances, the act of A-1 cannot amount to murder, but only to culpable homicide not amounting to murder. Hence the act of A-1 would amount to an offence under section 304 (Part I), Indian Penal Code, and not under section 302, Indian Penal Code "

This, I think, is a very fair characterisation of the facts of this case Though he has considered only clause *firstly* and *secondly* of section 100, Indian Penal Code, I do not think that the facts would bring the case under clause *fifthly* or *sixthly* that section either. Though tying up accused 1 might cause some apprehension in the mind of the first accused, it cannot be said in the circumstance of this case that it was done with the intention of kidnapping or abducting the first accused, nor can it be said that it was with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release This is because according to the evidence of P W 2 given in the Magistrate's Court, Bhadrappan had only asked to tie accused 1 so as to take him to the Police Station So, I am satisfied that this case would not be covered by section 100, Indian Penal Code, and it should be held to be a case of the first accused having exceeded his right of private defence. The appellants rely upon the case reported in *Viswanath* v *State of Uttar Pradesh*[1],

1 (1960) S C J 26 (1960) 1 S C R 646 · (S C) 21. 1960) 1 An W R (S C) 21 . (1960) 1 M L J.

and argue that the case will fall under that section That was a case which clearly fell within clause fifthly that is, an assault with the intention of kidnapping or abducting and would not therefore help the appellants. But however, there is one matter which is of considerable importance in this case, as rightly hold by the learned Sessions Judge, accused 1's intention must have only been to free himself from Bhadrappan's hold and run away before being caught by P.Ws 1 and 2. The attack was only with a penknife, there was no premeditation for the attack on the deceased, and what was given was only a single stab

Their Lordships in the above mentioned case have remarked as follows —

> " The appellant gave only one blow with a knife which he happened to have in his pocket It is unfortunate that the blow landed right into heart and therefore Gopal died. But considering that the appellant had given only one bolw with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harn than was necessary for the purpose of defence. As has been pointed out in *Amjad Khan* v *The State*[1], these things cannot be weighed in too fine a set of scales or in golden scales "

In this case too if the stab had been a little this way or that, death would not have resulted and at the worst accused 1 would have been guilty only of an offence under section 324, Indian Penal Code The position of accused-1, is thus no worse than accused-2's. It is unfortunate that Bhadrappan died But in the circumstances where the act of accused 1 was merely with the intention of escaping, though technically the matter may fall under section 304 (Part I), Indian Penal Code, a very mild sentence would serve the interest of justice in this case. It appears that accused 1 has already served about 10 or 15 days in jail. I consider, therefore, that it would be enough in the interests of justice, if the period of imprisonment is confined to the period already undergone and a fine of Rs 500 is imposed In regard to the second accused his conviction under section 324, Indian Penal Code, is correct I do not think that a fine of Rs 200 imposed on him is excessive. The sentence imposed on the first accused will be modified as indicated above and the sentence on the second accused will stand.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. M ANANTANARAYANAN, *Chief Justice*

Kamakshi Ammal . *Petitioner**

v.

Hav Maj S Rajaraman and another *Respondents*

Limitation—Pronote executed by two co-promisors—Executants not agents of each other—Endorsement of part-payment by one co-promisor within three years of the pronote—Second endorsement by the other co-promisor more than three years after the date of pronote but within three years of first endorsement—Suit on pronote—Limitation—Whether second endorsement can be relied on for limitation.

Held applying the principle laid down in 54 M L.J. 150 that a person who made a second endorsement, more than three years after the date of the document but within three years of an endorsement of part payment by a co-promis or, must, by his conduct, " be deemed to have ratified the first payment," that the endorsement by the second defendant can also be relied on for purpose of limitation, and that the suit is in time.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the District Judge, East Thanjavur at Nagapatti-

1. (1952) S C J 227 . (1952) 2 M L J 97 : (1952) S C R 567.

*C R. P No 1598 of 1962 6th December, 1968.

nam dated 11th December, 1961 and passed in A S No 114 of 1958 (O S No 110 of 1958 on the file of the Court of the District Munsif, Nagapattinam)

T S Kuppuswami Iyer, for Petitioner.

The Court delivered the following

JUDGMENT —This is a singularly disquieting case, because of the delays of the judicial process revealed in the protracted history of this simple suit upon a negotiable instrument against two defendants. That apart, I may also add that the revision is pressed only as against the second defendant ,one of the two co-promisors, and that he has not appeared before this Court in spite of notice served, to contest the revision

It is an unfortunate fact that the suit was instituted on a lost promissory note. Though there is considerable evidence with regard to the contents of this note and the endorsements appearing thereon, nevertheless, the undeniable fact that the note is not available, does raise some difficulty with regard to one incidental issue, *viz*, the actual date of one endorsement of payment which, according to the plaintiff, was on 16th April, 1955 The relevant facts are as follows·

The note itself was executed on 19th May, 1951 by both the defendants as co-promisors The learned District Judge of East Thanjavur has now held, by the judgment in Appeal Suit No 114 of 1958, after a remand of this proceeding by Ramachandra Iyer, Officiating Chief Justice, in C R P. No 1089 of 1960, that the two defendants were not agents of each other, as contended by the plaintiff I shall accept this finding, for purposes of the subsequent discussion On 10th August, 1953, the first defendant made a payment of Rs 10 towards the suit debt, and endorsed and signed the payment. Since this is within three years of the date of execution, it would certainly be an acknowledgment of liability binding on the first defendant, and extending the period of limitation under sections 19 and 20 of the Limitation Act.

The second defendant made a payment on 26th July, 1954, and endorsed and signed the recital of the payment It will at once be seen that this endorsement is beyond the period of three years from the date of execution of the note, *viz*, after 19th May, 1951. Hence, this endorsement may not, *ex facie*, serve to maintain the instrument as still within time, as against the second defendant.

But learned Counsel for the plaintiff stresses that the first defendant, the co-promisor, made an endorsement on 10th August, 1953, that this endorsement by the second defendant is within three years of that date, and that the second defendant, by endorsing on 26th July, 1954, must be deemed to have been aware of the part payment by his co-promisor on 10th August, 1953, and must be deemed to have acquiesced in it.

There is another payment on 16th April, 1955, and the suit was instituted on 15th April, 1958 There was the contention that this last payment, by the second defendant, on 16th April, 1955, was really made by him in March, 1955 If that was correct, the suit against the second defendant would, again, be time barred, as it would not be instituted within three years of this last endorsement. But, on this aspect, learned Counsel for the revision petitioner appears to be justified in his contention that in C R P. No 1089 of 1960 it was never sought to be seriously pressed before Ramachandra Iyer, Officiating Chief Justice, that the endorsement dated 16th April, 1955, was really made in March. No contention of that kind was apparently advanced, and the learned Officiating Chief Justice takes it as established that the payment was on 16th April, 1955. In the light of that fact, I would agree that it was really not open to the learned District Judge to proceed to assess the matter afresh, and to come to a conclusion that the endorsement was in March Hence, on this aspect, the suit is not time-barred as against the second defendant There remains only the question whether the payment by the first defendant on 10th August, 1953, must be deemed to have been within the knowledge

of the second defendant, and to have been acquiesced in by the second defendant, because of the endorsement by the second defendant, following a part-payment on 26th July, 1954 Ramachandra Iyer, Officiating Chief Justice, thought that it was at least a strong circumstance probabilising the knowledge and acquiescence. Actually, there is an authority of this Court in *Rangasamy Aiyangar* v *Somasundaram Chettiar*[1], where a learned single Judge of this Court has held, under very similar circumstances, that a person who made a second endorsement, more than three years after the date of the document, but within three years of an endorsement of part payment by a co-promisor, must, by his conduct, "be deemed to have ratified the first payment." Applying this principle, it appears to be clear that the endorsement by the second defendant dated 26th July, 1954, can also be relied on for purposes of limitation, and that the suit is consequently in time.

There is no other point involved in the suit. The averment of discharge having been negatived at an earlier stage of the protracted history of the litigation, the revision is pressed only as against the second defendant. It is allowed, and there will now be a decree against the second defendant for the suit amount with costs throughout.

S.V J. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K. S. RAMAMURTI AND MR. JUSTICE A. ALAGIRISWAMI

Kanakaraj . *Appellant**

v

B V. Sundararaja Iyer and another *Respondents*

Mortgage Law—Possessory mortgage—Mortgagor depositing the amount into the Court and re-entering on the property later—Rendition of accounts by the mortgagee under section 76 (1) *of the T P Act—Mortgagor, if should file a suit every three years from the date of discharge—Final and complete settlement of all accounts in one single action—Principle of* res judicata, *if arises*

Limitation Act (IX of 1908), *Article* 109—*Scope—Tender and deposit of mortgage money—Possession by mortgagee after discharge, if that of a trespasser—Mortgagees, liability statutory liability under section* 76 (1) *of the T. P Act—Mortgagor's claim if one for mesne profits.*

Limitation Act (IX of 1908), *Article* 105—*Legal relationship of mortgagor and mortgagee coming to an end and mortgagor re-entering possession—Article* 105, *if governs the suit by the mortgagor under section* 76 (1) *of the T P. Act.*

Mortgage Law—Suit for rendition of accounts under section 76 (1) *of the T. P Act—Lower Court commiting mistake in arriving at the quantum—Plaintiff (mortgagor) not filing memorandum of cross-objections—Mortgagor, if could sustain the trial Court decree on any other point*

Till 28th July, 1959, *i e*, to the day prior to the delivery of possession by the mortgagee, the mortgagor had the right to file a suit for redemption and as an essential part of the relief of redemption, obtain possession of the properties from the mortgagee and also ask for rendition of account for the rents and profits from the mortgaged properties under section 76 (*i*) of the Transfer of Property Act, the period of accounting commencing from 16th January, 1951, when the sum of Rs 917 was deposited into Court For that period there is no question of any time limit and it is established law that all accounts and equities between the parties could and ought to be worked in the same suit

This rule of mortgage law of insisting upon a complete and final settlement of all accounts between the mortgagor and the mortgagee in one single action has

1 (1928) 54 M.L J. 150.

* Appl. No. 271 of 1962 1st March, 1967.

been so strictly insisted upon so as to attract the principles of *res judicata*, under section 11, Civil Procedure Code, and the splitting up of the cause of action and reliefs under Order 2, rule 2, Civil Procedure Code, the principle being, the mortgagor and mortgagee ought to claim in the same suit all the reliefs flowing out of the mortgage transaction That being so, the mortgagor cannot be expected to file a suit every three years for the rents and profits of the property from the date when the mortgage should be held or deemed to have been discharged It is only to emphasise and give effect to this principle that till actual redemption, there ought to be no time-limit for claims and cross-claims In the Limitation Act of 1877 time was specifically made to commence to run from the date when the mortgagor re-entered on the mortgaged property, instead of the date of the receipt, under the earlier Act of 1871.

It is elementary that the mortgagee by delivering possession of the property cannot take away the right of the mortgagor which was then subsisting and alive. It is obvious and it lies on the surface to notice that is only to provide for such a contingency that the Article 105 of the Limitation Act provides that time would commence to run only after the mortgagor re-enters upon the property.

The possession of the mortgagee after tender and deposit of the mortgage money is not that of a trespasser even though his possession thereafter is wrongful. A claim against him for rents and profits is not a claim for mesne profits, he is under a statutory liability to render accounts, under section 76 (i) of the Transfer of Property Act

Article 109 in the terms would apply only to a claim for mesne profits against a trespasser. The nature of the relief that would be granted in a suit under Article 109 has got its own special incidents The burden of proof is upon the plaintiff as to the quantum of profits The defendant who is liable for mesne profits is entitled to certain allowances and deductions such as public charges as Government rent, revenues, or cess The measure of liability for mesne profits in a suit under Article 109 is not the actual loss sustained by the plaintiff who has been kept out of possession and deprived of the profits from the property. There the test is not what is lost to the plaintiff as a result exclusion but what the defendant has or might with due diligence reasonably have realised by his wrongful possession The liability sought to be enforced against the mortgagee for surplus profits received under section 76 (i) of the Transfer of Property Act is a statutory liability.

Even assuming that the mortgagee should thereafter be treated only as trespasser, Article 109 being the general article, will not apply in the case of a special particular situation specifically provided for under Article 105 of the Limitation Act.

Article 105 would govern every case of a suit by a quandum mortgagor against the quandom mortgagee and including suits for rendition of accounts under section 76 (i) of the Transfer of Property Act The fact that at some point of time, the legal relationship came to an end and the mortgagor re-entered possession of the property thereafter, would not affect the applicability of Article 105.

As regards the quantum, the learned Subordinate Judge has committed a mistake in doubling the produce which the defendant had realised, the landlord's share even according to him, *i e*, 441 kalams for 7½ years

There is no evidence that the defendant was guilty of any negligence or wilful default and that he could or ought to have realised more than 441 kalams

As regards the price of the paddy, the account books produced by the defendant themselves show that during the relevant period, he has been selling the paddy at the rate of Rs 20 on an average, per kalam The fact that in the plaint, the plaintiffs claimed the price of the paddy at Rs 15 per kalam cannot be used against the plaintiffs

The plaintiffs were naturally ignorant of the actual price for which the defendant had sold the paddy. There is no reason why the defendant should not be

held liable for the price he had actually realised, *viz*, Rs 20 per kalam, which is proved from the entries of his own account books The plaintiffs, therefore, would be entitled to the value of 441 kalams at Rs 20 per kalam From this calculation there will be some reduction in the amount actually decreed But, in determining the defendant's liability, the trial Court ought to have awarded interest with annual rests on the surplus collections made by the defendant and wrongfully retained by him for over 7½ years The fact that the plaintiffs have not preferred a memorandum cross-objections either in relation to the price of paddy or their right to interest with annual rests does not matter, they will be entitled to sustain the decree as passed by the trial Court on any point or points open to them It is well-settled, that when an item in an account appearing in the decree of the lower Court is reduced by the Appellate Court, the respondent without filing any memorandum of cross-objections can support the decree passed by the trial Court by showing that it had wrongly decided against him (respondent) on other items.

In the instant case, the period is fairly long and an award of 6 per cent simple interest, would be reasonable and just

Appeal against the Decree of the Subordinate Judge of Dindigul in Original Suit No. 45 of 1960.

A. V. Narayanaswami Ayyar, for Appellant

K. Rajah Ayyar and *N. R. Chandran*, for Respondent

The Judgment of the Court was delivered by

Ramamurti, J—The main point that arises for decision in the present appeal preferred by the defendant relates to limitation, as to the period for which the respondents (the plaintiffs) are entitled to recover the income of the properties which were subject to a possessory mortgage. The plaintiffs in the suit are the successors-in-interest of the mortgagor, while the sole defendant is the successor-in-interest of the mortgagee The possessory mortgage in question was executed in April, 1924 and by January, 1938, the defendant became the ultimate assignee of the mortgage. The plaintiffs filed Original Petition No 48 of 1950, on the file of the Sub-Court, Dindigul, under sections 9-A and 19-A of the Madras Agriculturists Debt Relief Act for a declaration of the amount due under the possessory mortgage, after invoking the benefit of sealing down, and on 16th January, 1951, the amount payable to the mortgagee was determined in the sum of Rs 917 This amount was deposited into Court in Original Petition No 48 of 1950 and notice was alo served upon the defendant As the petition was not opposed the Court passed an order on 21st August, 1951, granting the certificate that the mortgage debt had been fully discharged.

The defendant preferred an appeal, Civil Miscellaneous Appeal No. 502 of 1951 to the High Court and the same was allowed by Mack, J, by his judgment, dated 2nd May, 1954 The plaintiffs preferred Letters Patent Appeal No 150 of 1954 and the Bench of this Court by its judgment, dated 28th March, 1958, allowed the appeal and restored the order of the Subordinate Judge The defendant thereafter on 29th July, 1959, surrendered possession of the properties covered by the possessory mortgage The plaintiffs' attempt to recover rents and profits from the properties for the date of their deposit of the amount into Court till the mortgagee surrendered possession and the plaintiffs re-entered proved futile resulting in the present suit, Original Suit No 45 of 1960 The objection of the defendant that the claim for profits would be governed by Article 109 and, therefore, the plaintiffs should be restricted to a period of three years, was negatived by the trial Court, which held that the claim for the entire period from 16th January, 1951 to 29th July, 1959, was in time and passed a decree against the appellant for a sum of Rs 12,750 on the basis that the total income for which the defendant would be liable would be 882 kalams of paddy at the rate of Rs. 15 per kalam Two points arise for decision (*i*) what is the proper article of the Limitation Act applicable to the claim made in the suit, and (*ii*) the quantum of mesne profits and the price of paddy per kalam. Sri A.V. Narayanaswami Iyer, learned Counsel for the appellant urged that after

the plaintiff deposited the amount as determined in the proceedings under the Debt Relief Act and after the Court granted a certificate that the mortgage had been discharged after notice to the mortgagee, the latter ought to have redelivered the mortgaged properties, the possession of the mortgagee thereafter was wrongful and unlawful as being that of a trespasser, that the claim for income from the properties was clearly a claim for mesne profits within the meaning of Article 109 of the Limitation Act of 1908 and the plaintiffs cannot, therefore, recover for a period of more than three years. He urged that the relationship of mortgagor and mortgagee ceased and came to an end when the Court granted a certificate of discharge in Original Petition No 48 of 1950 and that thereafter, the only right of the plaintiffs was to recover possession of the properties from the mortgagee within the time-limit allowed by law along with the mesne profits and that so far as the claim for mesne profits was concerned, the plaintiffs should file a suit every three years He further urged that the fact that arising out of the mortgage transactions, the law imposes a duty upon the mortgagee to surrender possession of the properties and to render an account for the rents and profits after the discharge of the mortgage would not make the possession of the mortgagee anything other than wrongful or as that of trespasser, or alter the character of the claim for income other than one for mesne profits The substance of his arguments is that whatever may be the obligation of the mortgagee consequent upon the discharge of the mortgage, whether contractual or statutory, the claim for rents and profits would be governed only by Article 109 of the Limitation Act In the course of his arguments and when questions were put to him, learned Counsel for the appellant took up the definite stand that after the mortgage was discharged, it was for the mortgagor to elect whether to sue for recovery of possession along with the profits or to sue for recovery of possession alone or to sue for profits alone subject to any bar under Order 2, rule 2, Civil Procedure Code, and that if the mortgagor elects to wait to recover possession taking advantage of the large period of limitation to file a suit for recovery of possession ; the mortgagor would be exposed to the risk of a plea of limitation under Article 109 of the Limitation Act with respect to the income and that at his peril, the mortgagor is bound to sue for recovery of the income every three years He urged that this result necessarily flows from the language of columns 1 and 3 in Article 109 of the Limitation Act which is unqualified and absolute

Sri Rajah Ayyar, learned Counsel for the respondents, contended that the correct and appropriate article applicable to the suit is Article 105 of the Limitation Act which provides for the suit by a mortgagor after the mortgage had been satisfied to recover surplus collections received by the mortgagee, the time-limit is three years to commence from the date when the mortgagor re-enters on the mortgaged property. He contended that under the procedural law regarding litigations between mortgagor and mortgagee either in a suit for redemption or in a suit for foreclosure or for sale, there ought to be a final and complete settlement of all rights, equities and accounts between the mortgagor and the mortgagee right, upto the moment of actual redemption, foreclosure or the sale, as the case may be, and that either by way of a claim or a defence or a set off or as a counter-claim of the defendant the parties ought to raise all pleas, legal and factual, and seek all the reliefs flowing from the relationship as mortgagor and mortgagee and that the law of procedure does not permit piecemeal and truncated litigations between them leaving some portion of the dispute and the awarding of reliefs thereto for future adjudication in some other proceeding, except under exceptional circumstances where the statute itself specifically provides for such piecemeal and plurality of litigations. He also drew our attention to a recent decision of the Supreme Court reported in *Gyarsi Bai* v *Dhansukhlal*[1], in which this rule of the insistence of the finality of all disputes in one single litigation between the mortgagor and mortgagee was applied and was held, that at the time of the passing of the final decree, the Court must take into account the rents and profits received by the mortgagee between the date of the preliminary decree and the passing of the final decree Mr. Raja Iyer contended that Article 105 of the Limitation Act

1. (1965)2 S C J 783 (1965) 2 S C.R 154 : A.I R 1965 S C. 1055.

embodies this procedural law governing suits between the mortgagor and the mortgagee and entitles the mortgagor to recover the surplus collections received by the mortgagee in a suit filed within three years after the mortgagor re-enters on the mortgaged property. He urged that the acceptance of the appellants' contention that the mortgagor should file a suit to recover surplus collections every three years while yet he had ample time (under the Limitation Act) either to file a suit for redemption or to file a suit for possession would be opposed to the basic principles of law of procedure and the mortgage law

Even at the outset, we may state that both on principle and on authority, the claim is governed by Article 105 of the Limitation Act and time would commence to run only from 29th July, 1959, when the appellant delivered possession of the property to the respondents In the Limitation Act of 1859, there was no provision for such suits and it was held that section 1 clause 16 of that Act would apply, six years from the time the cause of action arose In the Act of 1871, a specific provision, Article 105 was made, columns 1 and 2 being the same as in the present Act, but the starting point of limitation in the third column was *the date of the receipt of such profits* Under the Act of 1877, column 3 was altered making the time to run from the date which the mortgagor re-entered on the mortgaged property The same provision was continued in the Act of 1908 with which we are concerned as well as in the present Act of 1963 Article 61 (*c*) Till 28th July, 1959, *i e*, to the day prior to the delivery of possession by the mortgagee, the mortgagor had the right to file a suit for redemption and as an essential part of the relief of rendemption, obtain possession of the properties from the mortgagee and also ask for rendition of account for the rents and profits from the mortgaged properties under section 76 (*i*) of the Transfer of Property Act, the period of accounting commencing from 16th January, 1951, when the sum of Rs 917 was deposited into Court For that period there is no question of any time-limit and it is established law that all accounts and equities between the parties could and ought to be worked in the same suit

We must first refer to the classical statement of law by Stuart, Vice-Chancellor in the leading case *Hood* v *Easton and others*[1] In that case, in a suit for redemption, as a part of that relief, the mortgagor made a claim asking for an account of the quantity and value of the coal wrought by certain persons with permission of the mortgagee for a period, more than six years before the bill was laid and in repelling the plea of limitation, the law was stated by the Vice-Chancellor in these terms.

"It is said, however, that length of time has deprived the plaintiff of any right to recover this value as against the Eastons, who obtained possession of it by the conversion of the property, for that the act complained of was completed in the year 1847 and this bill was not filed until more than six years after this act was committed To apply the principles of the statute of Limitation to a case of this kind seems to me not only not without any authority, *but to contravene one of the plainest principles on which the Court deals with all matters between mortgagor and mortgagee* The right of the mortgagor to get back the property pledged for its value is unquestionable. The account never could be taken without charging the mortgagee with all that has been properly received by him as the value of the mortgaged property Suppose, instead of the value of this property being received by the persons dealing with him, it had been received by the mortgagee himself, why, it is an item in the mortgage account, and if the mortgagor is entitled to any remedy in respect of this sort of dealing at all, it must be by having the value of the property allowed in taking the account of the mortgage Therefore, to say that as to one large item you are to hold it is to be struck out, because that item might have been brought into credit, ten, twenty or thirty years before, seems to me entirely besides that principle on which the statute of limitations proceeds. The simple question is, whether or not, such an adverse title can be asserted by the Eastons who wrought the coal, as that it can prevail against the mortgagor it seems to me that if there ever was any right, as I apprehend there was unquestion-

1. 2 Jur. (N S.) 729.

ably a right, on the part of the mortgagor, during the progress of this transaction, to keep it after it was completed—to retain the value—the value must at all times be an item in the mortgaged account—must be subject to all those rights, in regard to the settling of the account, as any other part of the transaction between mortgagor and mortgagee For that reason I cannot see on what principle the statute of limitations can be set up here by the defendants the Eastons, who, by their dealing with the mortgagee, entered upon the working of this mine, worked it, sold the mortgage property, and received the value "

The account taken against mortgagee in possession is an unbroken and continuous account of a debtor and creditor The mortgagee is debited with all sums which he has received or which he is to be treated as having received by virtue of the mortgage whether rents and profits and accidental payments such as proceeds of sale he is also debited with the value of the damage and loss caused by him and every item of account is taken into account against him Equally he is credited with the principal money with interest accruing due from time to time and with costs, charges and expenses, including all expenditure upon the mortgaged property which he is entitled to charge against the mortgagor The nature of the account itself is that it is one single integrated account and should be taken without any restriction as to time-limit, the notion of a piecemeal accounting at intervals has no place in such a relationship (Vide 27, Halsbury's Laws of England, Third Edition, page 430, paragraph 850 and also 24, Halsbury's Laws of England, page 269, paragraph 524).

This rule of mortgage law of insisting upon a complete and final settlement of all accounts between the mortgagor and the mortgagee in one single action has been so strictly insisted upon so as to attract the principles of *res judicata*, under section 11, Civil Procedure Code, and the splitting up of the cause of action and reliefs under Order 2, rule 2, Civil Procedure Code, the principle being, the mortgagor and mortgagee ought to claim in the same suit all the reliefs flowing out of the mortgage transaction That being so, the mortgagor cannot be expected to file a suit every three years for the rents and profits of the property from the date when the mortgage should be held or deemed to have been discharged It is only to emphasise and give effect to this principle that till actual redemption, there ought to be no time-limit or claims and cross-claims. In the Limitation Act of 1877 time was specifically made to commence to run from the date when the mortgagor re-entered on the mortgaged property, instead of the date of the receipt, under the earlier Act of 1871 The significance of this amendment (in the Act of 1877) came up for special notice in an early Bench decision of the Allahabad High Court in *Jaijit Rai* v *Gobind Tiwari*[1]. The purchaser of the equity of redemption filed a suit for redemption and recovery of possession of the mortgaged properties with an account for surplus profits alleging that the mortgagee had not paid any revenue, which the purchaser was compelled to pay, that out of the rents and profits, the mortgage debt has been discharged leaving a surplus year after year One of the contentions raised was that the claim for surplus profits for more than three years was barred by limitation Justice Mahmood delivering the judgment rejected this objection as to limitation in these terms at page 311 after referring to the significant change in the third column between the Act of 1871 and the Act of 1877.

" The question of limitation applicable to such a claim was a matter of some doubt under the old law Act (XIV of 1839) till it was settled by the Full Bench ruling of the Calcutta High Court in *Baboo Lal Doss* v *Jamal Ally*[2], in which Peacock, C J pointed out that the position of a mortgagee after the mortgage-debt has been liquidated by the usufruct, was not that of a trustee, and this view was subsequently adopted by the Legislature in section 3 of the Limitation Act of 1871, and retained in the corresponding section of the present Limitation Act (XV of 1877). Article 105, Schedule II of the Limitation Act of 1871, rendered such claims subject to the limitation of three years, calculated from the date of

1. (1886) I.L.R. 6 All. 303. 2. (1868) 9 W.R. 187.

the receipt of the surplus profits; but in the present Act the corresponding clause, whilst retaining the period, has introduced an important alteration by rendering the period of limitation computable from the date. "when the mortgagor re-enters on the mortgaged property" It is therefore clear that in the present case the plaintiff's claim for surplus profits cannot be barred

We may also refer to the leading decision in *Hari* v *Lakshman*[1], in which this rule was laid down that litigations between mortgagor and mortgagee should comprise all the reliefs and should afford a ground for a final decision and that a suit for an account upon the mortgage cannot be maintained by the mortgagor unless he also asks for redemption This rule was applied even in a case in which the mortgagor was entitled to relief under the Dekkhan Agriculturists' Relief Act of 1879 Reference may be made to the following observation of Westropp, C.J. at page 620.

> "We can well understand why the Legislature should refrain from giving to mortgagors the power to harass their mortgagees in possession with suits *de anno in annum* to ascertain what those mortgagees annual received from the lands over and above their necessary expenses in relation to those lands, such suits being brought without any present intention on the part of the mortgagors to pay to the mortgagees the balance due upon the mortgage, and without liability to a decree therein either for foreclosure or sale"

The principle was applied in a later decision in *Bhau Balaji* v *Hari Nilkanth Ray*[2], in which it was held that when the mortgagor rightly or wrongly obtained a decree for accounts only, a subsequent suit by him for possession of property and payment of money declared to be due would be barred under the principles of section 13 and section 43, Code of Civil Procedure of 1882, corresponding to section 11 and Order 2, rule 2 of the Code of 1908. In Ghosh on Mortgages, Fifth edition, at page 593, the learned author observes .

> "As a rule a mortgagee can be called upon to account only when the mortgagor seeks to redeem except where such redemption has become impossible"

(Vide also the statement of law in Mulla's Transfer of Property Act, Fifth edition, page 533) In a Bench decision of this Court in *Parasurama Pattar* v. *Venkatachellam Pattar*[3], it held that at the time of the redemption, the mortgagor is entitled to insist on credit being given for all the payments made by him *without any time-limit* which payment the mortgagee defaulted as per the terms of the mortgagee deed The same principle (following *Bhau Balaji* v. *Hari Nilkanth Ray*)[3], that there is no time-limit for the claims and cross claims as between mortgagor and mortgagee and all the equities are to be taken into account in a suit for redemption was laid down again by a Bench of this Court in *Thekkamannangath Raman* alias *Kochu Poduval* v *Kakkaseri Pazhiyot Manakkal Karnavan*[4] We may also refer to the Bench decision of the Allahabad High Court in *Banwari* v. *Sakhraj*[5], in which it was held that in a suit for redemption the mortgagor is entitled to set off the yearly payment which the mortgagee is bound to pay to the mortgagor every year and that this sum for the whole of the period even beyond 12 years which the mortgagee has defaulted to pay, should be taken into account, there being no bar of limitation. We may refer to the decision of Devadoss, J, in *Narasimha Rao Pantulu* v. *Seshayya*[6], which was affirmed in Letters Patent Appeal in *Immani Seshayya* v. *Dronamraju Lakshmi Narasimha Rao Pantulu*[7], by Venkatasubba Rao and Reilly, JJ., The point relevant to note in that decision is that the usufructuary mortgage had fixed a period of 55 years with a stipulation that the mortgagee should make certain payments annually to the mortgagor and the suit for redemption was held to lie even before the expiry of 55 years under the peculiar facts of that case The argument before Devadoss, J, was that when the mortgagee committed default, the right of

1 (1881) I L R 5 Bom 614
2 (1883) I L R 7 Bom 377.
3 (1913) 25 M L J 561
4. (1915) 28 M L J 184
5 A I R 1931 All 585
6 (1924) 48 M L J 363
7 (1929) 57 M L J 800

the mortgagor was only to sue year after year for the recovery of the amount payable to him and that it was not a matter which would form part of the relief of redemption. This argument was rejected and it was held that the mortgagor could not be driven to file suits year after year for the recovery of the amount payable to him by the mortgagee nor the mortgagor bound to pay *beriz* on the land year after year and bring a suit every year against the mortgagee for the recovery of the amount. In this decision the decision *Jaijit Rai* v *Gobind Tiwari*[1], already referred to was followed. We may also refer to the Bench decision of the Travancore-Cochin High Court in *Kurien Chacko* v. *Ramakrishna*[2], in which following the Bench decision of this Court in *Tekkamannengath Raman* alias *Kochu Poduval* v. *Kakkaseri Pazhiyot Manakkal Karnavan*[3]. It was held that no question of limitation arises as between mortgagor and mortgagee when an account is taken at the time of redemption The same view was taken by that Court in *Raman Pillai* v. *Sultan*[4]

Our attention was drawn to a decision in *Raj Mohan* v *Sarada Charan*[5]. In that case the purchase of an equity of redemption tendered and deposited, under section 83 of the Transfer of Property Act, the amount due to the mortgagee in possession, but the latter refused to accept the same A suit for recovery of possession was filed and possession obtained from the mortgagee Later on, a suit was filed for mesne profits from the mortgagee, from the date of the service of notice of the deposit under section 83 till the mortgagor got back possession The High Court held the suit was not maintainable and barred by Order 2, rule 2, Code of Civil Procedure in the view that the claim by the mortgagor for over payment to the mortgagee or surplus or excess profit received by the mortgagee should all be included in the suit for recovery of possession or for redemption It was also held that the relationship of mortgagor and mortgagee subsisted even on such tender or deposit and that the mortgagee does not become a trespasser from the moment of the deposit under section 83 of the Transfer of Property Act. This decision emphasises that law discountenances multiplicity of proceedings between the mortgagor and mortgagee and that any litigation between them and reliefs prayed for therein should be such as to enable the Court to afford final and complete relief between the parties

We have no hesitation in holding that the plaintiffs could not have merely filed a suit for accounts for the receipt of the surplus profits under section 76 (*i*) of the Transfer of Property Act either year after year or for any period leaving outstanding the claim for redemption and for recovery of possession It was perfectly competent to the mortgagor to wait and bring a suit for redemption for recovery of possession within the time-limit under Article 148 of the Limitation Act and in that suit, claim all the reliefs he would be entitled to, including the claim for rendition of accounts from the mortgagee in terms of section 76 (*i*) of the Transfer of Property Act. The only time-limit is that suit for redemption or a suit for possession must not become time-barred

To sum up, the law does not permit the mortgagor to file separate suits against the mortgagee ; the law does not comple him to file such suits On the other hand he ought to and is entitled to combine all the reliefs in the suit for possession without any time-limit. (Vide also Mulla's Transfer or Property Act, Fifth Edition, page 534, where the learned author has summed up this legal position.

The next question arises as to how and on what principle of law this claim for rendition of accounts for the surplus profits of the property under section 76 (*i*) of the Transfer of Property Act for the entire period of eight years which was subsisting on 28th July, 1959, a day prior, to the delivery of possession becomes barred by limitation for a period exceeding three years prior to the suit. It is elementary that the mortgagee by delivering possession of the property cannot take away the right of the mortgagor which was then subsisting and alive It is obvious and it lies on the surface to notice that it is only to provide for such a contingency that Article 105

1 (1884) I L R 6 All 303
2 A I.R 1952 T C 552
3 (1915) 28 M L J 184
4 A I R 1956 T C 49
5 A I R 1936 Cal 200.

of the Limitation Act provides that time would commence to run only after the mortgagor re-enters upon the property

Learned Counsel for the appellant urged that as the mortgage became discharged after the deposit and the certificate of discharge passed by the Court on 21st August, 1951, the position of the mortgagee was only that of a wrong-doer not in the character of mortgagee and that the claim for profits of immoveable properties belonging to the plaintiffs wrongfully received by the defendant is barred within the meaning of Article 109 He would urge that from 31st August, 1951, there is no question of redemption of the mortgage which has been discharged but that it was only a claim for recovery of possession wrongfully withheld by a trespasser without title coupled with the claim for mesne profits and that whatever it may be, when the wrongdoer handed over possession the claim for mesne profits for every year would get barred by the expiry of three years from the end of that year under the third column of Article 109 In support of his argument, he relied upon the difference in the language in section 60 in contrast to the language of section 62 of the Transfer of Property Act In order to get over Article 105, he further urged that that article would apply only to cases in which there is an express provision in the mortgage deed, that the mortgagee would get discharged out of the rents and profits of the property within a particular period and that article would not apply to a case in which the rents and profits are to be appropriated by the mortgagee only towards interest on the loan and at any rate not to a case in which by the provisions of the special statute, the mortgage debt itself gets scaled down either in full or in part Considerable portion of his argument was devoted on this aspect, it was utterly unintelligible besides being opposed to the plain language of the article. Further the important limits in this argument are incorrect and unsound.

The possession of the mortgagee after tender and deposit of the mortgage money is not that of a trespasser even though his possession thereafter is wrongful. A claim against him for rents and profits is not a claim for mesne profits, he is under a statutory liability to render accounts, under section 76 (*i*) of the Transfer of Property Act Before the amendment in section 76 (*i*) under the amending Act XX of 1929, a Bench of this Court in *Subba Rao* v *Sarva Rayudu*[1], had to consider whether the mortgagee in possession after the deposit under section 83 of the Transfer of Property Act was entitled to credit for just allowances towards payment of land revenue, and it was held that the mortgagee in possession who wrongly refused to accept the tender or deposit did not thereby become a trespasser and cease to be a mortgagee. This decision followed the Bench decision of the Calcutta High Court in *Satyabadi Behara* v *Harabati*[2], where the law was stated in these terms:

> "It is necessary to add, that there is nothing in these sections to indicate, that upon improper refusal of a valid tender, *a mortgagee ceases to be a mortgagee and becomes a trespasser*; on the other hand, the fact that the accounts are to be taken, either upto the date of the decree or upto the date fixed for redemption, indicates that he continues to be a mortgagee, although a heavier liability is imposed upon him, inasmuch as he loses interest after the date of tender and has to account for his gross receipts from the mortgaged property. It may also be noticed, that the Transfer of Property Act indicates, in other places the circumstances under which a security extinguished see for instance, section 89 which provides that upon actual sale under a decree for sale, the security is extinguished, and section 92, which provides that upon payment of the sum due under a redemption, decree a mortgagor is entitled to get back his property free from the mortgage. It is nowhere stated, however, that a valid tender by itself, is sufficient to extinguish a mortgage. Reliance, however, need not be placed upon this circumstance, as the Transfer of Property Act does not profess to be a complete Code But as we have indicated, the section to which reference has been already made, appear to support the view, that though a mortgagee refuses a valid tender at his risk, he does not thereby cease to be a mortgagee, and that, whatever is due to and from him after the date of the tender, should be included in the accounts taken in a subsequent suit for

1. (1921) I.L.R. 47 Mad. 7 : 44 M.L.J. 534 2 (1907) I.L.R. 34 Cal. 223 at page 228.

redemption This view is supported by high authority to which we shall presently refer "

The same view was taken in a recent Bench decision of the Patna High Court in *Harbans* v *Ramdhari*[1], in which it was held that after a deposit under section 83 of the Transfer of Property Act, the mortgagee does not become a mere trespasser but that he is a mortgagee still holding the property as a kind of trustee for the mortgagor with a statutory liability to render account for the rents and profits received by him from the date of the deposit (*Vide* also Mulla's Transfer of Property Act, Fifth Edition, page 536 where the learned author has summed up the position)

We may at this stage refer to the decision of the Nagpur High Court in *Mulchand* v *Ganga*[2], which had to consider the effect of the discharge of a debt by the operation of a statute under the relevant provisions of the Debt Conciliation Act This case effectively answers the point stressed by learned Counsel for the appellant as to the effect of the certificate of discharge granted by the Sub-Court on 21st August, 1951, under section 19-A of the Madras Agriculturists Debt Relief Act Mudholkar, J , (as he then was) held that by the mere fact that the Debt Conciliation Board passed an order that the mortgagee's claim must be deemed to have been discharged under section 8 (2) (*b*) of the Debt Conciliation Act, the possession of the mortgagee did not become adverse to the mortgagor and the mortgagee could not be said to have excluded the mortgagor from possession from the date of the satisfaction of the mortgage The Central Provinces Tenancy Act contained a special provision of a period of three years for a suit for possession of tenancy lands, the time to commence from the date of dispossession or exclusion In that case the mortgagor filed a suit more than three years after the award of the Debt Conciliation Board, the argument was that from that date onwards, the mortgagee was in possession in his own right to the exclusion of the mortgagor for more than three years but it was held that it was a suit for redemption and would be governed by Article 148, the mortgagor's possession not being adverse The law was stated in these terms at page 72 .

"Even if we take into consideration the effect of section 8 (2), Debt Conciliation Act, the position of the defendants does not become different *The discharge of a debt by the operation of a statute does not amount to a redemption of the mortgagee.* Similar argument based on section 10 of Bengal Regulation XV of 1793, which was addressed before the Allahabad High Court was repelled in *Sudarshan Das Shastri* v *Ram Prasad*[3], and it was observed that

'So long as the property remains in the hands of the mortgagee it cannot be *said that the mortgagee has been redeemed*'

This decision was later approved in *Habibullah* v. *Abdul Hamid*[4]."

Article 109 in terms would apply only to a claim for mesne profits against a trespasser The nature of the relief that would be granted in a suit under Article 109 has got its own special incidents The burden of proof is upon the plaintiff as to the quantum of profits. The defendant who is liable for mesne profits is entitled to certain allowances and deductions such as public charges as Government rent, revenues, or cess The measure of liability for mesne profits in a suit under Article 109 is not the actual loss sustained by the plaintiff who has been kept out of possession and deprived of the profits from the property. There the test is not what is lost to the plaintiff as a result of exclusion but what the defendant has or might with due diligence reasonably have realised by his wrongful possession. The liability sought to be enforced against the mortgagee for surplus profits received under section 76 (*i*) of the Transfer of Property Act is a statutory liability imposed by the statute to render an account and the incidents of that liability cannot be equated to that of a liability of a mere trespasser-wrongdoer under Article 109 of the Limitation Act The nature and a character of this liability, its measure, the burden of proof are all totally different and would not come under Article 109 of the Limitation Act which merely deals with tortious liability and liability under

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1 A I R 1960 Pat 51
2. I.L R (1950) Nag. 68.
3. (1910) I L R 33 All 97.
4. (1912) I.L.R. 34 All. 261,

common law The statute (Transfer of Property Act) declares that the relationship between the parties is such that one is bound to render an account to the other. A claim for mesne profits simpliciter on the basis of wrongful possession is not a claim for accounts as there is no accountable relationship in the legal sense of the term, though to ascertain the mesne profits some accounts and calculations may have to be taken The mortgagee under section 76 (i) of the Transfer of Property Act is liable not only for the rents and profits which he actually receives but also for the rents and profits which, but for his wilful default or neglect, he might have received, i e, for everything he has received, or might or ought to have received while he continued in possession (*Vide* 27 Halsbury page 287, paragraph 539) It is this principle of English Law which has been embodied in section 76 (i) of the Transfer of Property Act.

Mr Rajah Iyer, therefore, urged that such a suit would be governed either by Article 105 or in any event by Article 120 and not Article 109 It is unnecessary to consider the applicability of Article 120 as we are clear in our minds that Article 105 would apply to the instant case At this stage, it is necessary to refer to two recent decisions of the Supreme Court, both reported in the same volume *Suraj Ahir* v *Prithinatha Singh*[1], and *Prithi Nath* v *Suraj Ahir*[2], in which the scope of the provisions of section 6 of the Bihar Land Reforms Act (XXX of 1950) as amended by Act XVI of 1959, came up for consideration In that case, the mortgage money was paid by the mortgagor to the mortgagee but the mortgagee still continued in possession The purchaser of the equity of redemption wanted to recover possession of the property and the question arose whether he is entitled to the benefits of section 6 (*c*) of the Bihar Land Reforms Act of 1950, as amended by Act XVI of 1959, which was to the followinge effect

"(*c*) lands used for agricultural or horticultural purposes forming the subject-matter of a *subsisting mortgage* on the redemption of which the intermediary is entitled to recover khas possession thereof"

The Supreme Court held that this enabling provision would not help the plaintiff as on that date there was no *subsisting mortgage* as the same had been discharged by payment of the money by the mortgagor to the mortgagee The Supreme Court Court took the view that as the mortgagee received the payment resulting in the discharge of the mortgage and there being no *subsisting mortgage* on the date of the vesting, the possession was not as mortgagee The same aspect was stressed in the latter decision in *Prithi Nath* v *Suraj Ahir*[2], to the effect that when the mortgage money had been paid up thereafter there was no question of appropriating the rents and profits accruing from the property, towards interest on mortgage money and that, therefore, the mortgage and the right of the mortgagee to remain in possession came to an end Dealing with the incidents of the right of redemption, the law was stated in these terms at page 1042

"It is to be noted that these provisions do not state when a mortgage ceases to be a mortgage They simply describe tha right of a mortgagor to redeem Now what is this right, and, in what circumstances does it arise? The right arises on the principal money payment of which is secured by the mortgage deed, becoming due The right entitles the mortgagor, on his paying or tendring to the mortgagee the mortgage money to ask him (*i*) to deliver to him the mortgage deed and other documents relating to the mortgaged property, (*ii*) to deliver possession to the mortgagor, if the mortgagee is in possession, and (*iii*) to transfer the mortgaged property in accordance with the desire of the mortgagor If the mortgagee receives the money and does not perform any of the three acts required of him to be done, the question arises whether this non-compliance with the demands will make the mortgage continue The provisions of the section do not say so and there appears no good reason why the mortgage should continue If the mortgagee is not to perform these acts, the mortgagor is not to pay the amount, if, however, the mortgage money has been received by the mortgagee

1 (1963) 2 S C J 140 (1963) 3 S C R 290 A.I.R. 1963 S C 454

2 (1963) 3 S C R 302 . A I R 1963 S C 1041.

and thereafter he refuses to perform the acts, he is bound to do, the mortgagor can enforce his right to get back the mortgage document, the possession of the mortgaged property and the reconveyance of that property through Court A new right to get his demands enforced through the Court thus arises as a result of the provisions of section 60 of the Act "

The observations in the aforesaid two decisions of the Supreme Court could be understood in their proper context with reference to the applicability of the particular provision of the particular statute, the Bihar Land Reforms Act *Further that case was one in which the mortgagor had made payment to the mortgagee direct* But what is relevant to notice in that decision is the statement that after the discharge of the mortgage, a *fresh statutory liability* and a new right to get his demands accrued in favour of the mortgagor to be enforced under either section 60 of that Act or section 76 (i) of the Transfer of Property Act (though the later provision was not referred to). Further that case did not deal with the precise nature or character of the liability of the mortgagee under section 76 (i) of the Transfer of Property Act We are not prepared to hold that this decision of the Supreme Court warrants the view that the liability of a mortgagee in wrongful possession after the deposit of the mortgage amount is merely that of a trespasser simpliciter

Even assuming that the mortgagee should thereafter be treated only as a trespasser, Article 109 being the general article, will not apply in the case of a special particular situation specifically provided for under Article 105 of the Limitation Act.

The principle of the maxim *generalia specialibus non derogant, specialia derogant generalibus* that, when there is a particular provision and a general provision in the same statute the particular provision would be operative and override the general provision, the latter taking effect only with respect to the other portions of the statute to which it may properly apply, would govern the instant case This rule has been applied in numerous cases in the matter of the proper interpretation and application of the several articles in the Limitation Act and it will be sufficient to refer to some of the leading decisions

In *Natesan Chetti* v *Soundararaja Ayyangar*[1], the vendor filed a suit to recover unpaid purchase-money by enforcement of the vendor's lien (claiming a charge upon the property sold) eight years after the sale but within twelve years of the same Article 111 of the Act of 1877, provided a time-limit of thee years for a suit by a vendor of immovable property to enforce his lien for *unpaid purchase money*, while Article 132 of the same Act provided a time-limit of twelve years to *enforce payment of money charged upon immovable property* The lower Court applied Article 132, but the Bench consisting of Subramania Ayyar and Davies, JJ , reversed the decision observing as follows

" Now Article 111 refers solely and in unmistakable terms to suits such as the present, which Article 132 deals with suits for money charged upon immovable property generally In the case cited above, no reasons were stated as to why the learned Judges arrived at the conclusion that Article 111 was inapplicable to cases similar to this, and that conclusion is opposed to the well established canon of interpretation that as a rule, general provisions do not derogate from special provisions, but that the latter do derogate from the former *Generalia specialibus non derogant, specialia derogant generalibus* It is scarcely necessary to observe that, if Article 111 does not apply to such suits as the present, it is impossible to see to what suits it would apply "

Under the Act of 1908 Article 111 has been amended so as to restrict it to a suit by an unpaid vendor for personal payment of the unpaid purchase-money and all suits for the enforcement of payment of money charged upon an immovable property are now governed by Article 132

1. (1897) I L R. 21 Mad 141 7 M L J 275

We may next refer to the Bench decision in *Naramada Bai* v. *Bhavanishankar*[1], in which this well established rule that

> " If there be two Articles which may cover the case, the one, however more general and the other more particular or specific, as a principle of construction the more particular and specific Article ought to be regarded as the one governing the case "

was applied This case too arose under the Limitation Act of 1877 The mother of the plaintiff in that case had (in 1897) deposited some ornaments, clothes and money with the defendant for safe custody and made a demand for the return of the same in 1898, which was refused After her death and more than three years after the demand and refusal, the plaintiff sued to recover the property or its value as an alternative, and the question arose whether the suit was barred under Article 48 or 49 of the Act of 1877 or was within time being governed by Article 145 of the Act Article 48 provided a time-limit of three years for recovery of specific movable property acquired by theft, extortion, cheating or dishonest misappropriation Article 49 provided the same time-limit of three years for recovery of the movable property wrongfully taken or wrongfully detaining of the same, Article 145 of that Act fixed a time-limit of thirty years for a suit against a depository or a pawnee to recover movable property deposited or pawned The Bench held that Article 145 which dealt with the case of a deposit and entrustment, being a particular article would apply and the suit was in time. In *Kumar Rameshwar Narain Singh* v. *Mahabir Prasad*[2], the plaintiff filed a suit to set aside rent sale under the Chota Nagpur Tenancy Act, 1902 on the ground of fraud and the question arose whether the suit would be barred by limitation under Article 12 which provided a time-limit of one year for setting aside of a sale in execution of a decree of a civil Court or sale for arrears of Government revenue or sale in 'pursuance of an order of a Collector within time under Article 95 of the Limitation Act which specifies a period of three years as time-limit to set aside a decree obtained by fraud or for other reliefs on the ground of fraud. It was held that Article 95 was a special provision providing for relief on the ground of fraud and would prevail over Article 12 the general provision.

Lastly, we may refer to the Bench decision in *Ramiah & Co* v. *Sadasiva Mudaliar*[3] in which the same rule that the special Article would override the provisions of a general Article was applied There the plaintiff purchased certain bales of shirtings from the defendant in August, 1918 and sold these bales to his customers. In April, 1919, the plaintiff discovered that there was shortage or deficiency in the number of pieces in the bales and he filed the suit in February, 1922 against the defendant for damages for short delivery The suit was resisted, *inter alia* on the ground that the claim was barred by limitation under Article 62, being essentially in the nature of a claim for money had and received, time commencing to run from the date of the receipt, but this argument was rejected on the ground that Article 96 which deals with a special kind of suits for relief on the ground of mistake would apply, time commencing to run from the date when the mistake became known to the plaintiff

The question now arises for our consideration, whether the present claim is governed by the special provision, Article 105, so as to exclude Article 109 On this portion of the case, we have not the slightest hesitation in holding that there is no substance whatsoever in the arguments of the appellant The words *mortgagor*, *mortgage* and *mortgagee* are general and unqualified, we see no warrant and nothing in the compelling context of the Article for restricting its scope to any particular type of mortgage. Only two conditions should be complied with (*i*) the mortgage must have been satisfied, and (*ii*) the mortgagor must have re-entered on the mortgaged property so as to start the running of time The discharge or the satisfaction of the mortgage may arise in any number of ways, either by the terms and conditions of the contract or by operation of law or by the provisions of any pre-existing or

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1. (1902) I L R. 26 Bom 430
2. (1926) I L R 5 Pat. 759
3. (1925) I L.R 48 Mad 925. 49 M L J. 228.

supervening statute Indeed, learned Counsel for the appellant could not logically develop the argument, that the article should be restricted only to mortgages which contain a provision for the discharge of the interest and the principle from out of the rents and profits of the property It is unnecessary to express an opinion as to whether the possession of the mortgagee after the discharge of the mortgage is purely that of a trespasser, or, the possession is a wrongful possession, but at the same time the mortgagee occupying a fiduciary position to protect the rights and interests of the mortgagor not allowing the property to be sold for arrears of revenue, protecting it from committing acts of waste or damage and also take such necessary steps as may be required to safeguard and protect the interests of the mortgagor ; because, in our opinion, even assuming that the possession of the mortgagee is that of a trespasser simpliciter, Article 105 would still apply By the terms of Article 105 as well as *ex-concessio* Article 105 postulates a stage when the mortgage has been satisfied or discharged, the relationship of the mortgagor and the mortgagee having come to an end For Article 105 to apply, it is not necessary that the relationship of mortgagor and mortgagee should continue, under the third column, time would commence to run only after the mortgagor re-enters on the property It is obvious indeed the matter is not open to any argument contra, that Article 105 is intended to cover a suit for working out the rights of a mortgagor and the obligations of the mortgagee during the period when the mortgagee continued in possession after the satisfaction of the mortgage We are of the clear view that Article 105 would govern every case of a suit by a quondum mortgagor against the quondum mortgagee and including suits for rendition of accounts under section 76 (*i*) of the Transfer of Property Act The fact that at some point of time, the legal relationship came to an end and the mortgagor re-entered possession of the property thereafter, would not affect the applicability of Article 105 This view of ours is supported by ample authorities.

We must first refer to the Bench decision of the Allahabad High Court in *Muhammed Fayaz Ali Khan* v *Kallu Singh*[1], in which it was held that a suit by the mortgagor, after the mortgage had been satisfied, to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-entered on the mortgaged property under Article 105 of the Limitation Act of 1877, corresponding to Article 105 in Act IX of 1908 In that case, the mortgagor first obtained a decree for redemption and possession and instituted the suit for recovery of surplus proceeds in pursuance of the liberty reserved to institute such a suit The Bench took the view that the scope of Article 105 was unrestricted and that it did not matter how the mortgagor re-entered or obtained possession of the property. This judgment refers to the previous legislative history of Article 105, the change in column 3, between the Act of 1871 and the Act of 1877 The Bench was not inclined to accept the *obiter dictum* in an earlier Bench decision, in *Ram Din* v *Bhun Singh* [2], that Article 105 must be restricted to cases where the mortgagor got possession of the mortgaged property, otherwise than by means of a suit for redemption The relevant aspect to be noted for the purpose of the present discussion is that the Bench held that the only Article that would apply to a case was Article 105 and that Article 109 would apply only to suits other than a suit by a mortgagor for surplus collections

Reference may next be made to the Bench decision of the Calcutta High Court in *Prasanna Kumar* v *Nilambar*[3] Therein a suit for redemption of a usufructuary mortgage, the mortgagors claimed that if proper accounts were taken, large sums would be found due from the mortgagee The mortgagee contended that a such claim for recovery of surplus profits would be barred under Article 120 of the Limitation Act The Bench overruled this objection holding that in a suit for redemption, there was no time-limit so far as the recovery of the surplus collections was concerned, provided, however, the suit for redemption was in time under Article 148, the reason-

1. (1910) I L R 33 All 244
2 (1908) I L.R 30 All 325
3 A I R 1922 Cal 189

ing being that in a suit for redemption all equities ought to be adjusted between the parties It is in connection with this that the Bench had to deal with the relative applicability of Article 105 and it was held that Article 105 was intended to cover cases where after the mortgage has been satisfied, the mortgagor has re-entered on the mortgaged property otherwise than by means of a suit for redemption In this Bench decision too, reference is made to the prior legislative history of the difference in the nature of the provision in the Act of 1859 and the Act of 1908 At this stage, we may refer to the Bench decision of the Bombay High Court reported in *Rukhmini Bai* v *Venkatesh*[1], judgment of Chandavarkar, J, and Heaton There the plaintiff, the mortgagor, filed a suit under section 62 of the Transfer of Property Act, to recover possession of the mortgaged property and also deposited the amount due to the mortgagee The Court passed a decree for possession and the mortgagor also recovered possession from the mortgagee Thereafter the mortgagor filed another suit to recover mesne profits from the defendant from the date of the deposit upto the date when the mortgagor recovered possession of the mortgaged property The suit was dismissed on the ground that it was barred by section 13 or section 43 of the Civil Procedure Code of 1882 corresponding to section 11 and Order 2, rule 2 of the Code of 1908 respectively Chandavarkar, J, delivering the judgment of the Bench observed that after the date of the tender or the deposit, the mortgagee continued as mortgagee with a statutory liability to account for the profits received by him from that date, that the mortgagee was not then a mere trespasser, but a mortgagee still holding the property as a kind of trustee for the mortgagor The learned Judge had also observed that there is nothing in the Transfer of Property to warrant the inference that after a proper deposit the mortgage has become extinguished so as to make the possession of the mortgagee that of a mere trespasser We are making reference to this decision only to indicate the rival point of view that even if the mortgagee had been paid he is not trespasser for all purposes Reference may be made to the statement in Ashburner's Principles of Equity, Second Edition, page 191 that

"a mortgagee only becomes a trustee for the mortgagor after he has been paid."

(Vide also Halsbury's Laws of England, Volume 27, page 412, paragraph 800 that when a mortgage has been paid of, the mortgagee is a trustee for the mortgagor. Even if the decision of the Supreme Court in *Prithi Nath* v *Suraj Ahir*[2], should be understood as indicating a different point of view (we do not thing so), that does not in any way affect the applicability of Article 105 To conclude, whether the mortgagee after satisfaction of the mortgage still continues to be mortgagee or a *quasi-trustee* (See *Jagannath* v *Sripathibabu*)[3], with certain fiduciary obligations or a mere trespasser, a suit for recovery of the surplus profits has been carved out as a special category of suits and provided for under Article 105

On behalf of the appellant, reliance was placed upon an early Bench decision of the Calcutta High Court in *Sakari Datta* v *Ainuddy*[4] There the mortgagor in pursuance of a decree for redemption deposited the amount but the mortgagee did not deliver possession of the property but continued in possession, for over a period of one year. The mortgagor, after having obtained possession of the property filed a fresh suit for recovery of the mesne profits due on account of the wrongful possession, the trial Court dismissed the suit on the ground that the prior proceedings operated as a bar The plaintiff took up the matter to the High Court On behalf of the defendant, a further objection was raised that the suit was not maintainable in any event in a Court of Small Causes Article 31 of Schedule II of the Provincial Small Causes Courts Act provides that any other suit for accounts including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee is not maintainable in a Court of Small Causes The Bench took the view that Article 31 would not apply to the case on the ground that after the mortgage has been satisfied, the defendant ceased to be a mortgagee It

1 (1907) I L R 31 Bom 527
2 (1963) 3 S C R 302 . A I R 1963 S C 1041.
3 (1945) 1 M L J 478 I L R (1946) Mad 255
4. (1910) 12 Cal L J 620.

is true that the language in Article 31 of the Small Causes Courts Act is the same as the language in Column I of Article 105 The principle of this decision is not of much relevance to the instant case where the crucial question is, as to what extent, a special Article in the Limitation Act would override a general provision On this ground alone, the decision of the Calcutta High Court is distinguishable But with great respect to the learned Judges, it has to be pointed out that Article 31 of Schedule II of the Provincial Small Causes Court specifically covers a suit by a mortgagor after the satisfaction or discharge of the mortgage and when the defendant has ceased to be a mortgagee It is explicit in that Article that it deals with the precise situation after the defendant had ceased to be a mortgagee and the Article in its express language cannot apply to the situation of the defendant still retaining his character as a mortgagee

For all these reasons, we hold that the entire claim in this suit is in time under Article 105 of the Limitation Act

As regards the quantum, the learned Subordinate Judge has committed a mistake in doubling the produce which the defendant had realised, the landlords' share even according to him, *i e*, 441 kalams for 7½ years The account books, Exhibits B-2 and B-3, of the defendant have been filed, which are maintained in the regular course of business They are genuine accounts It cannot be seriously urged that the defendant fabricated the accounts for the purposes of this suit A statement appears to have been filed in the trial Court, culling out the entries from these account books, as a result of which the figure of 441 kalams was arrived at as the total quantity of paddy actually realised by the defendant If the defendant himself had personally cultivated the lands allowance will have to be made for cultivation expenses.

There is no evidence that the defendant was guilty of any negligence or wilful default and that he could or ought to have realised more than 441 kalams

As regard the price of the paddy, the account books produced by the defendant themselves show that during the relevant period, he has been selling the paddy at the rate of Rs 20 on an average, per kalam The fact that in the plaint, the plaintiffs claimed the price of paddy at Rs 15 per kalam cannot be used against the plaintiffs as they claimed 850 kalams, valued at Rs 17,000 but restricted their claim to a sum of Rs 12,750 The plaintiffs were naturally ignorant of the actual price for which the defendant had sold the paddy. We do not see any reason why the defendant should not be held liable for the price he had actually realised, *viz*, Rs 20 per kalam, which is proved from the entries of his own account books The plaintiffs, therefore, would be entitled to the value of 441 kalams at Rs 20 per kalam From this calculation there will be some reduction in the amount actually decreed But, in determining the defendant's liability, the trial Court ought to have awarded interest with annual rests on the surplus collections made by the defendant and wrongfully retained by him for over 7½ years. The fact that the plaintiffs have not preferred a memorandum of cross-objections either in relation to the price of paddy or their right to interest with annual rests does not matter, they will be entitled to sustain the decree as passed by the trial Court on any point or points open to them It is well-settled, that when an item in an account appearing in the decree of the lower Court is reduced by the appellate Court, the respondent without filing any memorandum of cross-objections can support the decree passed by the trial Court by showing that it had wrongly decided against him (respondent) on other items In several decisions, in a suit for sale or suit for redemption, or claim for mesne profits, this principle had been applied, and the amount decreed in favour of the successful party has been sustained by the appellate Court, though the appellate Court took a different view from that of the trial Court in respect of some of the items which made up the total liability of the defeated party We may refer to an early decision of the Allahabad High Court in *Shankar Lal* v *Madari Singh*[1], where the plaintiff filed a suit on a mortgage and gave credit

1. (1910) 7 I.C. 484.

to the defendant for a sum of Rs 245 as the value of certain grain and cattle delivered to the mortgagee by the mortgagor The defendant pleased that he had made some other part payments in cash and that the value of the grain and cattle was Rs 350 and not Rs 245. The trial Court held that the value of the grain and cattled was only Rs 245 It also held that the plaintiff was not entitled to compound interest but on appeal to the lower appellate Court it was held, the plaintiff was entitled to compound interest, that he had also received from the defendant a sum of Rs. 320 and that the value of the grain and cattle delivered to the plaintiff was Rs 350 and not Rs 245 and on this calculation, a decree was passed against the defendant for Rs 741. On appeal to the High Court, the plaintiff contended that inasmuch as the defendant had not preferred any cross-appeal in the lower appellate Court, as regards the value of the grain, it had no jurisdiction to enhance the value in favour of the defendant from Rs 245 to Rs 350 This argument was not accepted and it was held that it was quite competent to the defendant to raise all objections concerning the serveral items which made up his liability so long as he did not dispute the liability for the amount decreed against him by the trial Court

We may next refer to the Bench decision of this Court in *The Receiver of Nidadavole Estate* v *Vegasena Subbaraju*[1], in which the landlord had filed a suit for enchancement of rent as against the tenant and the question directly arose whether it would be competent to the lower appellate Court to award relief to the ryot when there has been no cross-appeal with regard to the disallowance of certain amounts. The Bench held that the appellate Court may uphold the decree of the lower Court on any ground warranted by law, though such a ground may not have been referred to or even disallowed by the lower Court The same principle was laid down in the Bench decision in *Md Ali* v. *Parmà Nand*[2], which related to a suit on a registered bond comprising several items and on some of which there was difference of view between the trial Court and the lower appellate Court. It was held that a party who was content to accept the lower Court's decision would be entitled to resist the appeal from that decision on the ground that the decree as erred in favour of the appellant It was also observed that the respondent not having appealed nor filed cross-objections, could not ask that the decree should be altered in his favour but that he would certainly be entitled to urge and show that the decree erred in favour of the appellant, and, therefore, ought not to be disturbed These two cases were referred to with approval by a Bench of this Court in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*[3], which dealt with a suit for partition where it was observed that·

> " though one item in an account may be found by the Court of Appeal against the respondent and on that footing the amount for which a decree has been granted by the lower Court may have to be reduced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake "

On the facts in that case it was held that that rule will not apply to reliefs based upon totally different causes of action.

Lastly we may refer to the Bench decision of the Calcutta High Court in *Rajendra Narayan* v *Bhirabendra Narayan*[4], where in a suit for mense profits this principle that the amount decreed could be sustained on a calculation different from that adopted in the lower Court was applied This Bench decision referred to with approval the statement of law in *Sri Ranga Thathachariar* v *Srinivasa Thathachariar*[3], referred to realier. The matter was put thus at page 569

> " This raises the question whether they are entitled to have these modifications in *the rate of interest* made in their favour in the absence of any memoranda of appeals or of cross-objections by them. One fact is clear that *a decision by us in their favour would not increase the total amount* of mesne profits decreed in their

1 (1904) I L R 28 Mad. 427 53 M L J 189
2 A I R 1918 Lah 129
3. I.L.R. (1927) 50 Mad 866 at page 875·
4 A I R 1938 Cal. 563.

favour by the lower Court Subject to this, we are of opinion they can attack the judgment relating to their claim for interest without filing memoranda of cross-objections The principle has been thus formulated by Srinivasa Ayyar, J., in *Ranga's case*[1] When an item in an account appearing in the decree of the lower Court is reduced by the appeal succeeding, the respondent without filing any memorandum of cross-objection can support the said decree by showing that the lower Court has wrongly decided against him on other items, but it is not open to the respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the lower Court without filing an appeal or memorandum of cross-objections As *interest is an integral part of mesne profits the plaintiff-respondents* are entitled on the said principle to maintain the amount of mesne profits decreed to them by the lower Court by a relative variation of the constituent elements without filing memoranda of cross-objections They are entitled to urge that if *interest* be reduced by the *Appellate Court, the profits may be assessed at a higher figure*, if the evidence supports it, provided that the total does not exceed the amount decreed as mesne profits by the lower Court, and *vice versa*. This involves no challenge to a different right or a different cause of action adjudicated against them by the lower Court which is not under challenge in the appeal at the instance of the appellant."

It is unnecessary to refer to further cases on this aspect

In a suit for account of surplus collections made after the date when the mortgage has been completely discharged and satisfied, the usual rule is to award to the mortgagor interest with annual rests as against the accounting party (*Vide* 27 Halsbury's *Law of England*, page 431, paragraph 853) We may refer to the leading English decision in *Ashworth* v *Lord*[2], in which in an action for redemption, it was held that the accounts must be taken against the defendant with annual rests from the date at which the mortgage debt was fully paid, and that annual rests is a matter of course. Reference may be made to the following statement of law at page 550:

"The principle on which annual rests are not ordered as against mortgagees in possession, whose interest was in arrear at the time when they entered into possession, is, that it cannot be considered that, in so doing, they elected to receive their capital by driblets. They are entitled, in the absence of any bargain to the contrary, to have their whole capital paid off at once, and the taking of possession is not evidence of such a bargain *But, after they have been paid in full, they are, as was pointed out by the* Master of the Rolls in *Wilson* v. *Metcalfe*[3], persons who are, in receiving the rents after their debt has been fully paid, availing themselves of another man's money for their own use and benefit, and they ought to be charged with interest In that case annual rests were directed to be made from the time at which the mortgage debt was fully paid, and that is what I have always understood to be the practice in the few cases in which the point has arisen It seems to me that annual rests are in the present case a matter of course"

In *Nagayya* v. *Venkata Subbarayudu*[4], a Bench of this Court while pointing out the difference between the case of a mortgagee in possession and a trustee as regards liability for interest observed at page 810 as follows .—

"A mortgagee in possession, as soon as his debt is paid off, will be bound to pay interest on any money which he may retain thereafter, while the liability of a trustee would depend on whether he is guilty of breach of trust, see *Wilson* v. *Metcalfe*[3], *Ashworth* v *Lord*[2], and compare section 23, Trusts Act."

On this matter it is sufficient to refer to the Bench decision of this Court in *Jagannath* v. *Sripathibabu*[5], in which it was held that under section 76 of the Transfer of Property Act, a mortgagee in possession though not a trustee in the strict sense of the term

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1 I L R. (1927) 50 Mad 866 at 875: 53 M L.J 189
2 (1887) L R 36 Ch. D 545.
3. 38 E R. 204
4 A I R 1918 Mad 807
5 I.L R (1946) Mad. 255 : (1945) 1 M L J. 53.

holds a fiduciary character and that on equitable principles, the Court has full power to direct interest to be paid on collections which have been wrongfully withheld by the mortgagee in possession. On the facts of that case an award of 15 per cent per annum was upheld as reasonable In the instant case, the period is fairly long and we think, an award of 6 per cent simple interest, would be reasonable and just Calculating at six per cent. per annum, the interest works out to Rs 1,728-72 and adding the principal of Rs 8,820, the amount due to the plaintiffs would be Rs. 10,548-72 The appeal, therefore, is allowed in part and the decree of the trial Court is modified to one for Rs. 10,548-72 with subsequent interest The plaintiffs would be entitled to their costs in the trial Court on the amount decreed The defendant will bear his own costs in the trial-Court. In the appeal, the parties will pay and receive costs in proportion to their failure and success.

V.M K. — *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE T RAMAPRASADA RAO.

Meenakshinada Deikshtar . *Petitioner**

v.

Murugesa Nadar and another *Respondents.*

Contract Act (IX of 1872), section 74—Agreement to purchase land—Purchaser paying a sum as 'deposit' or 'earnest money', to be forfeited in case of breach by him—Breach of contract by purchaser—Suit by him for recovery of advance paid—Whether entitled to—Vendor to plead and prove damage suffered by him—Duty of Court to determine reasonable compensation.

Words and Phrases—' deposit' *and* ' earnest money'.

" 'Deposit' or 'earnest money' is not part of the price bargained for, but it is unambiguously money paid for the due performance of the contract. (The proposition that any money paid contemporaneously with the execution of a contract has to be treated as deposit was not accepted.)

Mere misdescriptional nomenclature will not conclude matters. What may be called ' advance' may be ' deposit' and what may be termed ' deposit' may ultimately be proved to be ' advance'. In either case it is the intention of the parties that governs The cardinal rule of interpretation of contract, whether mercantile or otherwise, is to find out the intention of the parties. Such an intention could be gathered by the express terms of the contract or from the conduct and by surrounding circumstances incidental to such a contract The expression adopted may be a guide to find out such an intention. But it is not always the sole guide.

There is no justification for different principles of law being applied to mercantile contracts alone. The law has been declared uniformly by the Indian Contract Act and is applicable to contracts involving sale of land as also to agreements in the nature of ordinary commercial contracts. Very few exceptions are available to make a distinction.

In a given contract if a sum is paid under the caption of ' deposit' or ' earnest money' or has to be interpreted as such according to the intentions of parties, and is made forfeitable in case of breach, even then Courts have to adjudge the reasonable compensation to which a party would be entitled to, in such circumstances Such determination of reasonable compensation can be made either in a suit filed by the depositor (purchaser) against the depositee (vendor) or in a suit by the depositee (vendor) complaining of such breach Such adjustments which are necessary can and ought to be made in any one of the suits filed as above. The defendants (vendors) who interdict a claim for refund of deposit, have to plead and prove the damage suffered by them upon which the Court will adjudicate

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* C R.P. No. 1888 of 1966. 18th October, 1968.

as to what may be the reasonable compensation to which the defendants are entitled to and deduct the same and award a decree in favour of the plaintiff only for the balance Such is the onus cast on the vendors is an accepted proposition and is, well established The procedure which the defendants have to follow in such circumstances is that they are to allege and prove damage to themselves by either putting forward a plea of set-off or of counter-claim against the plaintiff for damages for breach of contract An independent suit for the same purpose is also maintainable.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Chidambaram, dated 13th December, 1965 and passed in S.C. Suit No 508 of 1965

K N. Balasubramanyam and *M Srinivasan* Advocate, for Petitioner

V Ratnam, for Respondent.

The Court delivered the following

JUDGMENT —The plaintiff is the revision petitioner. Under Exhibit A-2 dated 27th April, 1963, the plaintiff agreed to purchase the land belonging to the 1st defendant through the 2nd defendant who was the accredited power-of-attorney holder of the 1st defendant The plaintiff paid a sum of Rs 225 as advance towards the total price of Rs 1,537, which advance, in terms of the agreement, was liable to be forfeited in case the sale was not completed within the prescribed time and due to the plaintiff's default The term of the contract ran as under:

> "If you (the plaintiff) fail to complete the sale within the aforesaid time, you (the plaintiff) shall lose the said advance. If I (the 1st defendant through the 2nd defendant) fail to get the said sale deed registered within the aforesaid time, I (the 1st defendant through the 2nd defendant) will give you (the plaintiff) two times above the said advance."

In short, for a breach of the contract on the part of either the plaintiff or the defendants, one has to pay to the other a sum of Rs 225 as damages and the defendants had the additional privilege of forfeiting the sum of Rs. 225 if the plaintiff commits a breach of contract The transaction did not go through and the plaintiff filed a suit for the return of the advance The defendants solely relied upon the above clause relating to forfeiture and contended in the lower Court that they were entitled to forfeit the same The defendants' contention found favour with the learned District Munsif of Chidambaram though the defendants did not aver or prove damages having been sustained by them in consequence of the breach of the contract by the plaintiff Thus the plaintiff's suit was dismissed Against this the plaintiff has preferred the present Civil Revision Petition under section 25 of the Madras Provincial Small Causes Courts Act

Mr M Srinivasan, learned Counsel for the petitioner, contended that the defendants did not primarily discharge their burden by alleging in the pleadings that the money though named as 'advance' was in the nature of deposit for the due performance of the contract and that in any event there is no proof that the defendants suffered actual damage by reason of the alleged breach of contract by the plaintiff The sheet-anchor of his case is the ratio in *Fateh Chand* v *Balkishan Dass*[1]. He contended that in the absence of such proof of actual damages, the normal presumption is that the defendants are not entitled to any reasonable compensation and the plaintiff is therefore entitled to the decree as prayed for Mr Ratnam, learned Counsel for the respondents, however based his case on *Howe* v. *Smith*[2], referred to in *Venkoba Char* v. *Sanjivappa*[3], and argued that the real intention of the parties has to be gathered from the terms of the contract and the surrounding circumstances According to him, though the money paid under Exhibit A-2 is termed

1 (1964) 1 M L J 60 (S C) 60 · (1964) 1 An W R (S C) 60. (1964) 1 S C R 515 : (1964) 1 S C J. 187.

2 (1884) L R. 27 Ch D 89

3 A I R 1937 Mad 681.

as 'advance', it is really earnest money guaranteeing the performance of the contract and as the lower Court found as a fact that the plaintiff is in default he should fail. He urged that *Fateh Chand* v. *Balkishan Dass*[1], has not made any departure from the ratio in *Natesa Aiyar* v. *Appavu Padayachi*[2]. He would say that any payment made contemporaneously with an agreement from which springs a contract, should be deemed to be a deposit or earnest money He placed reliance on *Puran Chand* v. *Official Liquidator*[3], and vehemently argued that the plaintiff has to be non-suited because of his own default He would also maintain that different considerations ought to weigh with Courts while considering the import of mercantile contracts as opposed to other contracts involving sale of land, etc. He relied on *Satyanarayanamurthi* v *Erikalappa*[4], for the purpose. According to him, the principle laid down in *Natesa Aiyar* v *Appavu padyachi*[2], is still good law and the plaintiff is not entitled to the return of the deposit notwithstanding absence of pleading by the defendants as to the loss sustained by them or proof of the same.

Before the contentions of the parties are adverted to, it is convenient to note *Fateh Chand* v *Balkishan Dass*[1], and analyse its import. According to the Supreme Court, section 74 of the Indian Contract Act made an inroad into refinements of English Common Law, which always maintain a marked distinction between liquidated damages and penalty. In the case of breach of contracts, even where a certain sum is named as the predetermined damages and in case of breach of the same by either of the contracting parties, the Court has jurisdiction to find in a lis involving adjudication of the rights and obligations of parties to such a contract, as to who is in default and what is the reasonable compensation payable by the party in default to the other It does not matter which party to the contract initiates the proceedings and the Court is not bound by the quantified estimate of damages provided for in the contract itself It is salutary however for the Courts not to exceed the quantified damages so named in a contract. To quote the Supreme Court in *Fateh Chand* v. *Balkishan Dass*[1].

> " Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract ...."

It is however significant to find that the Supreme Court was not concerned in that case to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the clause described by the Court as " whether the contract names a sum to be paid in case of breach " In fact, the Supreme Court observed that section 74 of the Indian Contract Act dealt with the measure of damages in two classes of cases, (1) where the contract names a sum to be paid in case of breach, and (2) where the contract contains any other stipulation by way of penalty. The ratio of the above decision, however, is sufficiently indicative that any sum named in a contract to be paid by one to the other

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1 (1964) 1 M L J (S C) 60 . (1964) 1 An W R (S C) 60 · (1964) 1 S C J 187 (1964) 1 S.C R. 515
2 (1915) I L R 38 Mad 178: 24 M L J. 488 (F B)
3 A I R 1960 Punj 51.
4. (1926) 50 M L J 150.

in case of a breach, is susceptible to judicial probe by Courts and its reasonableness tested before awarding the same to the affected party In the instant case, therefore, the questions to be resolved are. (*a*) whether the advance of Rs 225 paid by the plaintiff to the defendants was as security, earnest money or deposit for the due performance of the contract? and (*b*) if so, is the amount a genuine pre-estimate of reasonable compensation to be paid by the defaulting party to the party complaining of breach of the contract?

I shall now deal with the meaning of the words ' deposit' or 'earnest money.' It will be convenient at this stage to dispose of the argument of Mr Ratnam that a distinction has to be kept up in explaining those words while considering mercantile contracts as opposed to contracts for sale of immovable properties. He relied on the observations of Sir Victor Murray Coutts Trotter, Chief Justice, in *Satyanarayanamurthi* v *Erikalappa*[1], reading as under:

> " I can content myself with saying that it is never the practice in mercantile contracts, to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit "

I do not think that any such broad distinction as contended is warranted The above observation was made in the particular circumstances of that case which related to a mercantile contract The quotation ought not to be understood as laying down any dichotomy as pleaded. The cases in *Fatch Chand* v *Balkishan Dass*[2], *Natesa Aiyar* v *Appavu Padayachi*[3], and *Bhagavathi Mudaliar* v *Subramaniam*[4], are all cases where contracts to sell and purchase lands were interpreted, but yet no such refined distinction as is sought to be made by the learned Counsel for the respondents, was accepted or even referred to There is, therefore, no justification for different principles of law being applied to mercantile contracts alone. The law has been declared uniformly by the Indian Contract Act and is applicable to contracts involving sale of land as also to agreements in the nature of ordinary commercial contracts Very few exceptions are available to make a distinction as claimed by Mr Ratnam

I therefore come to the question as to what is a ' deposit ' Cotton, L.J, in *Howe* v. *Smith*[5], observed:

> " . . . . . . .What is the deposit? The deposit as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making contract, it goes in part-payment of the purchase money for which it is deposited but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract then, according to Lord Justice James, he can have no right to recover the deposit."

The following observations of Lord Justice Fry in *Howe* v. *Smith.*[5] (at pages 95 and 101) are also appropriate;

> " It is not merely a part-payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

Touching upon the observations of Fry, L J, Sadasiva Ayyar, J, *Natesa Aiyar* v. *Appavu Padayachi*[3], is of the view.

> " Even according to *Howe* v. *Smith*[5], earnest money is intended to create by the fear of its forfeiture, a motive in the purchaser to fulfil the contract Just as the word ' forfeiture ' inevitably raises the idea of ' penalty ' in my mind, the word ' fear ' raises the very same idea. Whatever may be the view of the other

1. (1926) 50 M.L J 150 at 152
2 (1964) 1 M L J (S C) 60 : (1964) 1 An W.R. (S.C) 60 . (1964) 1 S.C J. 187 (1964) 1 S C.R 515 :
3 I L R (1915) 38 Mad 178 : 24 M L J. 488 (F B)
4 C R P No 2058 of 1965 of this Court—unreported
5 (1884) 27 Ch D. 89. p. 95 and 101.

High Courts, *Srinivasa* v. *Rathnasabapathi*[1], decided by this Court treats such stipulations as stipulations by way of penalty "

The Privy Council in *Chiranjit Singh* v *Har Swarup*[2], observed ·

" Earnest money is part of the purchase price when the transaction goes forward It is forfeited when the transaction falls through by reason of the fault or failure of the vendee "

The above citations have been referred to by Venkataramana Rao, J , in *Venkoba Char* v *Sanjivappa*[3], Thus ' deposit ' or ' earnest money' is not part of the price bargained for, but it is unambiguously money paid for the due performance of the contract. I am unable to accept the wide proposition of Mr Ratnam that any money paid contemporaneously with the execution of a contract has to be treated as ' deposit '

If this is the content of the word ' deposit ' or ' earnest money ,' then is it forfeitable without proof of damage whether or not expressed in a contract. Incidentally in some contracts the word ' advance ' is used Mere misdescriptional nomenclature will not conclude matters What may be called ' advance ' may be ' deposit ' and what may be termed ' deposit ' may ultimately be proved to be ' advance ' In either case it is the intention of the parties that governs The cardinal rule of interpretation of contract, whether mercantile or otherwise, is to find out the intention of the parties. Such an intention could be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances incidental to such a contract The expression adopted may be a guide to find out such an intention But it is not always the sole guide. In the instant case the parties used the word ' advance ' in the earlier part of Exhibit A-2, but stipulated for its forfeiture in case of breach, later If, therefore, it is established by pleadings and proof that the amount given by the depositor was earnest money for the due performance of the contract, then it can be forfeited by the depositee notwithstanding the breach of the contract by the depositor, this proposition, however, is subject to the doctrine of reasonableness which I shall presently deal with Forfeiture of deposit or earnest money by reason of default on the part of the purchaser is not necessarily a penalty Though the observations of Sadasiva Ayyar, J , in *Natesa Aiyar* v *Appavu Padayachi*[4], referred to above lend support to this, in view of the later pronouncement of the Supreme Court in *Fateh Chand* v *Balakishan Dass*[5], it is difficult to sustain that such forfeiture of deposit is invariably on the basis that it is a penalty The following passage in *Jagdishpur Metal Industries* v. *Vijay Oil Industries*[6] is very apposite:

" . . . . . in the case of an earnest money the doctrine of forfeiture is not based either on the principle of penalty or on the principle of recompense for the loss incurred by one party to a contract as a result of any breach of it by the other In my opinion, the doctrine of forfeiture in the case of an earnest money is based on a principle completely independent of the considerations that are laid down in sections 64, 65, 73 or 74 of the Indian Contract Act.

In fact, an earnest money, belonging as it does to a class of its own, namely, that of deposit, is regulated and controlled by considerations which are peculiar to that class alone. Therefore where the agreement is unequivocal and it is specifically agreed upon thereunder that what has been paid in advance towards contract is nothing but an earnest money, as understood in law, then it has to be dealt with in the light of the principles which apply to such deposits and not in the light of those that generally apply to restitution, penalty or liquidated damages."

Notwithstanding the above principle that deposit or earnest money is outside the pale of section 74 of the Indian Contract Act, yet does it follow that a suitor in a

1. (1893) I L R 16 Mad 474 3 M L J 124 488 (F B)
2. 50 M L J 629 : A I R 1926 P C. 1
3. A.I R 1937 Mad 681
4. I.L R (1915) 38 Mad 178 :24 M.L J.
5. (1964) 1 M L J (S C.) 60 : (1964) 1 An W R (S C) 60 . (1964) 1 S C J 187.
6. A I R. 1959 Pat 176 at 179

case for the refund of deposit is entitled to a decree merely for the asking of it in spite of his own default or the defendants are entitled to forfeit the deposit as a matter of course, in spite of absence of pleading and proof as to any damage suffered by the defendants? As section 74 is declaratory of the law as to liability of parties upon breach of contract, the principles enunciated by the Supreme Court in *Fateh Chand* v *Balkishan Dass*[1], and extracted by me in this judgment would still apply. Thus in a given contract if a sum is paid under the caption of "deposit" or "earnest money" or has to be interpreted as such according to the intentions of parties, and is made forfeitable in case of breach, even then Courts have to adjudge the reasonable compensation to which a party would be entitled to, in such circumstances Such determination of reasonable compensation can be made either in a suit filed by the depositor (purchaser) against the depositee (vendor) or in a suit by the depositee (vendor) complaining of such breach Such adjustments which are necessary can and ought to be made in any one of the suits filed as above. In the instant case, the purchaser who is in default filed the suit for recovery of the advance which is now urged by Mr. Ratnam as earnest money which is also expressly forfeitable Even in such a case the Court has to find whether the defendants have sustained the damage by reason of the plaintiff's default and award only a reasonable compensation

The defendants (vendors) who interdict a claim for refund of deposit, have to plead and prove the damage suffered by them upon which the Court will adjudicate as to what may be the reasonable compensation to which the defendants are entitled to and deduct the same and award a decree in favour of the plaintiff only for the balance Such is the onus cast on the vendors is an accepted proposition and is well established—vide *Rattamma* v. *Krishnamurthi*[2], and *Sundararama Iyer & Co* v. *Murugesa Mudaliar*[3] The procedure which the defendants have to follow in such circumstances is that they are to allege and prove damage to themselves by either putting forward a plea of set-off or of counter-claim against the plaintiff for damages for breach of contract—vide *Sri Lakshmi Talkies* v. *W M S. Tampoe*[4]. No doubt, an independent suit for the same purpose is also maintainable.

What has been done in the present case? The lower Court found as a fact that the plaintiff is in default. Regarding the suit claim, it non-suited the plaintiff and observed that the defendants had the right to forfeit the sum of Rs. 225 paid as advance, as it is expressly provided for in Exhibit A-2 It also added that the 2nd defendant is not bound to prove any special damage. It is not shown that the defendants at least pleaded that they suffered damage On the other hand, the plaintiff has pleaded that the defendants sold the property for a higher price In these circumstances, when there is a total absence of pleading regarding the character of the amount paid and when there is no iota of evidence that it was paid with the intention of treating it as earnest money for due performance of the contract, and in any event when no attempt has been made by the defendants to prove any damage sustained by them by reason of the plaintiff's default, the conclusion of the learned District Munsif is erroneous and is the result of wrongful exercise of jurisdiction. This has to be corrected by this Court under section 25 of the Madras Provincial Small Causes Court Act.

I am inclined in the instant case to remand the suit to the lower Court for fresh disposal in the light of my observations in this judgment. The defendants-respondents are given leave to amend their written statement and plead that the amount is deposit and set out their right to claim damages and to have it, on proof thereof, equitably set-off against the plaintiff's claim in full or in part The lower Court will assess the damage and give such relief to either of the parties as circumstances require.

The Civil Revision petition is allowed ; but the case is remanded to the lower Court for a fresh trial in the light of the observations in the judgment. There will be no order as to costs.

S.V J. —— *Petition allowed.*

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1 (1964) 1 M L J (S C) 60 (1964) 1 An WR S C 60 : (1964) 1 S C R 515: (1964) 1 S C J 187.

2 (1928) 54 M L J. 40 : A I.R. 1928 Mad 326

3 (1957) 1 M.L J 221

4 (1961) 2 M L J 349 at 355.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR JUSTICE R SADASIVAM

A. V. Meiyappan, Sole Proprietor of A. V. M. Productions, Madras.. *Petitioner**

v

The Commissioner of Commercial Taxes, Board of Revenue, Madras, and another *Respondents*

Madras General Sales-tax, Act (IX of 1939)—" Goods "—Definition of—All kinds of movable property other than newspapers etc—Legislation respecting sale of goods, if ultra vires, *as going beyand the meaning of " goods " given to it by the Constitution.*

Copyright Act (XIV of 1957)—Apparent transfer of ownership of the negative of the films during the period of lease—Lessor (producer) prohibited from making use of the negative except in terms of agreement—Agreement if operates as an outright sale of the films

Madras General Sales Tax Act (I of 1959), section 3 (2)—Single point levy on raw film—Exposed film if liable to tax again.

Madras General Sales Tax Act (I of 1959), section 12 (3)—Undisclosed turnover—Provision for penalty—Power to penalise evasion of tax lawfully due ancillary to the taxing power

Madras General Sales Tax Act (I of 1959), section 12 (3)—Undisclosed turnover—Sales Tax authorities not insisting upon inclusion in the preceding year—Non-disclosure not designed to evade tax—Levy of penalty, if justified.

The Madras General Sales-tax Act (IX of 1939) defined Goods as meaning all kinds of movable property other than newspapers, actionable claims, stocks and shares and securities

A like definition was incorporated in the Sales-tax Act I of 1959 The expression all kinds of movable property would necessarily take wthin its sweep even intangible or incorporeal movable property

The Constitution of India also provides in Entry 54 of List II for taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92 (*a*) of List I.

Article 366 also defines Goods as including all Materials, Commodities and Articles The rule of interpretation is that wherever a statute uses the word " Includes " in an intepretation clause, it intends thereby to add something to what the natural sense of the word normally conveys.

It is difficult to agree with the argument that "goods" has been defined in the relevant Article of the Constitution in an exhaustive manner. It may be that in so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax such as those contemplated in Entry 30, 84 or 80 of List I, or Entry 51, 52 or 56 of List II of the Seventh Schedule of the Constitution But that cannot control the definition in any way.

In so far as the argument purports to establish that the definition of goods in the Madras General Sales Act as meaning all kinds of movable property goes beyond the meaning of the expression given to it by the Constitution and for that reason the legislation in respect of sales or purchase of goods other than concrete goods is *ultra vires* it is very difficult to agree with that contention

The assessee is admittedly the sole owner of the entire property in the film which was the subject-matter of the agreement. The agreement was that the assessee should make over to the lessee the outright lease of the world negative rights of the said film for a period of 49 years ... . for a consideration amounting to the declared cost of production of the film plus 15 per cent thereon

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* W.P. Nos. 782 to 784 of 1966. 8th March, 1967

as profit to the producer, subject in any case to a minimum price of Rs 10,00,000 payable by the lessee to the producer.

The negative of the film from which positives are made for the purpose of projection in the cinemas is kept with the producer. That the property in the negative vests in the lessee during the continuance of the lease is made clear herein, for the producer maintains custody of the negative only as the agent and the custodian of the lessee and is prohibited from making use of the negative except for certain stated purposes There is also the obligation cast upon the lessee to return to the lessor on the determination of the lease

It is the contention of the Department that this agreement operates in effect as an outright sale of the film in question by the assessee to the so called lessee.

That the owner of the cinematograph film is an author within the meaning of the Copyright Act, who acquires a copyright in his production which enures for a period of 50 years, is beyond question. He is competent to assign that copyright and all the bundle of rights which that expression connotes to any other person wholly or in part with or without limitations for a term or for the full period.

It will be seen that out of the bundle of rights, the conferment of a lease for the purpose of the distribution, which is what is contemplated in the leases in the present cases, covers only one part of the several rights which the owner has. Notwithstanding the lease that has been granted in these cases, it would be open to the owner to make separate record of the sound track in the film or to communicate the film by radio-diffusion, that is to say, television and the like the only right which the lessor assessee has granted to the lessee in the instant cases would appear to be the right to have the film exhibited as a distributor together with the ancillary right of making or causing to be made positive prints for purpose of exhibition and no further right is given to him.

The question for determination is whether the grant of the lease for exploiting the film by distribution for purposes of exhibition to the public amounts, in what are claimed to be special circumstances of the case by the Department, to a sale of goods

The terms of the contract have to be interpreted in the light of what is generally understood in the trade.

The apparent transfer of ownership of the negative of the film during the period of the lease read in the light of the prohibition upon the lessor that he should not make use of the negative in any manner other than for the purpose of fulfilling the terms of the agreement and the further fact that this part of the clause is also expressly intended to operate only during the lease period indicates that the property in the film regarded as goods did not stand transferred to the lessee.

In the nature of things and particularly in view of the nature of the trade, it seems that these clauses do not establish the contention of the Department that they connote an outright sale of the negatives of the film regarded as goods along with the other right connected with it by way of distribution or exhibition

Even if copyright is regarded as a species of moveable property, the transactions in question do not connote sales at all Since no element of sale is involved, the taxing provisions of the General Sales Tax Act have no application at all

What the Department has done is to impose a tax on the basis of the entry in the First Schedule to Act I of 1959 at the rate of 10 per cent.

It is difficult to hold either on the basis of the report of Dr. P S Lokanathan or on the basis of the actual form which the legislation took with regard to films that an exposed film was not intended to be taxed solely for the reason that the raw films was liable to a single point levy.

It is seen from section 12 (3) that if a dealer fails to submit a return, the assessing authority may assess him to the best of its judgment. In such case, in addition to

the tax imposed, the assessing authority may impose a penalty of 1½ times the tax. But in a case where the assessment appears to the assessing authority to be incomplete or incorrect, the authority gives the dealer an opportunity of proving the correctness or completeness of the return, and after a hearing of that nature, if the assessing authority finds that any part of the turnover was not disclosed by the dealer in his return, a penalty not exceeding 1½ times the amount of the tax due on such undisclosed turnover may be imposed This provision accordingly requires the assessing authority to determine the quantum of the turnover that was not so disclosed by the assessee.

It is well recognised that a power to penalise evasion of tax which is lawfully due is ancillary to the taxing power and the provision cannot, therefore, be struck down.

Having regard to the underlying intent of the section it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to evade the tax It can hardly be that the Legislature thought that an innocent omission by oversight or some such reasons should still invite penal consequences

Looking at the circumstances in which the assessing authority imposed the penalty or has issued notice to show cause why penalty should not be imposed—in these cases, turnovers relating to transactions of this kind were not being included in the several preceding years, obviously due to the decision of the Sales Tax Appellate Tribunal, and it is further seen that the Sales Tax Authorities did not in the preceding years insist upon the inclusion of such turnover In these circumstances, the action under section 12 (3) of the Act is wholly unjustified In any event since no sales turnover is involved, no scope for levy of penalty at all exists.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed with Writ Petition No 782 of 1966 on the file of the High Court, the High Court will be pleased to issue writs of *certiorari* calling for the records (*i*) relating to assessment No MGST 3287/64-65, dated 23rd February, 1966 made by the second respondent so far as it relates to the levy of tax on transaction of lease of copyright in respect of the cinematographic films *Pooja ke Phool* and *Main bhi ladki hun* on the aggregate sum of Rs 44,41,674-14 in Writ Petition No 782 of 1966, (*ii*) relating to the assessment order of the second respondent in MGST 3287/65-66, dated 23rd February, 1966, determining provisionally the sales tax payable by the petitioner for the assessment year 1965-66 at Rs. 4,48,283 in Writ Petition No 784 of 1966 and to quash the assessment order in both the said writs and (*iii*) relating to the assessment of the petitioner for the year 1963-64 made by second respondent and to issue a writ of prohibition in Writ Petition No. 783 of 1966 restraining him from revising the assessment already made by him in respect of the year 1963-64 and levying a tax on a sum of Rs. 9,42,409-97 P.

V. K. Thiruvenkatachari for *King* and *Partridge*, for Petitioner.

The Advocate-General (*S Mohankumaramangalam*) for Special Government Pleader (*M. S. Ramaswami*), for Respondents.

The Order of the Court was made by

Srinivasan, J—In these writ petitions seeking the issue of appropriate writs, the validity of certain assessment to sales tax made by the Sales Tax Authorities and the steps taken by them to revise assessments already made are brought into question. The case is somewhat out of the ordinary and to start with the following facts may be stated The petitioner is a film producer, being the sole proprietor of Messrs A. V. M. Productions. In or about 1962, the petitioner obtained the copyright of a story in Hindi entitled *Pooja ke Phool* and on the basis of that story, he produced a cinematograph film. In 1964, a Hindi version of a popular Tamil picture was also produced The petitioner entered into an agreement with Messrs A V M. Limited whereunder the petitioner leased to the latter entity the right to exploit the cinematograph film *Pooja ke Phool* for a period of 49 years on certain terms, which will be referred to in detail later In respect of the second film, a similar agreement of lease was entered into in August, 1963, with Messrs. Murugan Brothers and this

lease comprised 1/20th of the rights of the petitioner Later by another agreement, a lease of 10/20th of the rights in that film for a period of 49 years, and a further agreement covering the balance of 9/20ths of the rights, were granted to Messrs. A V. M Limited In respect of the agreement for the first film, the petitioner received over Rs 25 lakhs in 1964 and, with regard to the second film, an aggregate of Rs. 19 lakhs and odd was recieved by the petitioner in 1965. For the assessment year 1964-65 the petitioner submitted his return which did not include the above sums. The assessing authority, the Deputy Commercial Tax Officer, however, decided to include in the assessable turnover the two sums mentioned above, treating the sums as representing the turnover of sales of films liable to a single point tax at 10 per cent under the First Schedule to the Madras General Sales Tax Act I of 1959. The contention of the petitioner broadly stated is that these are not sales of any goods but represented only realisations of the rights to exploit the films conferred upon him by the appropriate statute, *viz*, the Copyright Act. It is claimed that such rights in the films are not corporeal or tangible rights, nor are the films goods which are the subject-matter of any sale , and that there was no transfer of property in those films. The view taken by the assessing authority that in effect what was contemplated was the sale of the films is attacked as wholly erroneous and unjustified It was only the right of exploitation of the film, which, having regard to the nature of the industry, is the only method by which a producer can reap the results of his activities, that was the subject-matter of the lease agreement, and the petitioner contends that the transactions fall wholly outside the purview of the Madras General Sales Tax Act.

A second point has been taken that in any event the levy of tax at 10 per cent under the First Schedule to Act I of 1959 is illegal The First Schedule provides for a single point levy at 10 per cent on certain specified goods (higher than the normal rate of tax on the turnover of sales or purchases of general goods) ; the petitioner claims to have paid tax at that rate at the time of the purchase of the raw films and it is said that even if the processed film is regarded as the subject-matter of the sale, it cannot be subjected to a tax over again under the First Schedule to the Act.

A third point relates to the levy of penalty. The assessing authority took the view that by reason of the failure of the petitioner to disclose in his returns these two sums of Rs. 25 lakhs and Rs 19 lakhs as assessable turnovers, the penal provisions of section 12 (3) of the Act are attracted,and accordingly levied a penalty of Rs 6,66,251, computed at one and a half times the quantum of tax on the amount not so disclosed. It is claimed by the petitioner that he is not bound to disclose those turnovers, for they are not turnovers relating to sales of goods and that the levy of penalty is illegal

The above relates to the assessment for the year 1964-65. The next writ petition, Writ Petition No 783 of 1966, relates to a notice issued by the assessing authority proposing to reopen and revise the completed assessment for the year 1963-64. Proceedings were launched by the assessing authority seeking to include in the taxable turnover a sum of Rs 9,42,000 and odd received by the petitioner in respect of similar agreements relating to a lease of the exploitation rights of a Tamil film *Nanum Oru Penn* For reasons similar to those which have already been indicated, the petitioner claims this amount is not assessable to tax. The assessing authority has in addition to proposing to include this amount, issued a notice proposing to levy a penalty as well. The petitioner seeks the issue of a writ of prohibition in this case

Writ Petition No 784 of 1966 raises the question of a provisional assessment made for the year 1965-66 based upon the assessment for 1964-55. The assessing authority proposed by the notice to fix the turnover at Rs 44 lakhs and odd and called upon the petitioner to pay a tax of Rs 4,48,000 and odd thereon In Writ Petitions No 782 of 1966 and 784 of 1966, the petitioner prays that the assessment orders, final in the first case and provisional in the second, may be quashed as illegal by the issue of writs of *certiorari*

In the counter-affidavit filed on behalf of the respondents, the statement of facts is not denied. But what the respondents say is that:

"It was found that the petitioner had effected a sale of negative prints of these pictures for consideration received, though the transaction was described as a lease of the above pictures for a period of 49 years."

It is the contention of the assessing authorities that a scrutiny of the provisions of the documents of lease so-called clearly establishes that the property in the films had effectively passed from the petitioner to Messrs A V M Limited It is claimed that the negative of a picture is brought into existence, by expenditure of money, labour and skill; and that the species of movable property is created apart from the intangible rights residing in the producer; and that the property was in fact transferred for valuable consideration received It is stated that the transaction is

"In substance, transfer of property in goods for valuable consideration and, therefore, liable to tax."

The respondents also seek to distinguish between a copyright, which the petitioner has in the product of his labour and skill, which are the pictures, and the actual transactions that were put through, the latter, it is claimed, still represent a transfer of property in goods irrespective of whatever incorporeal rights might vest by the law of copyright in the transferor It is alleged that the real nature of the transactions has been camouflaged and when once it is established that the ownership of the films has passed from one to the other by virtue of the transactions, it can evidence nothing more than a sale of goods. A further point has been taken that in films of this kind, the value of a picture becomes completely wiped out by exhibition in the course of ten years or so, so that after the lapse of 49 years fixed in the agreements, the films, which are the subject-matter of the transactions have no surviving value at all. That is also relied upon to show that what passes under the documents is comprised of the entire rights of the lessor to the lessee, who are in reality the seller and the buyer, respectively. Turning to the levy of tax at 10 per cent, the Department contends that the relevant entry in the First Schedule to the Act cannot be read in the manner claimed by the petitioner It is true that the raw film is liable to tax at a single point at ten per cent. But a film which has been processed is a different product but still a film and can once again fall within the scope of this entry It is claimed that a processed film is not the same as the raw film and though a different object, continues to be a film, and when the sale of such a film takes place, it can be taxed under this entry; that is to say, the Department claims that in interpreting the expression "Film," a processed film must be regarded as different from the raw film, and though on the purchase of the raw film tax might have been paid, that fact cannot obviate the levy of tax on the sale of a processed film.

The counter-affidavits have not, however, traversed the complaint of the petitioner with regard to the levy of penalty.

By a further affidavit filed on behalf of the petitioner, an additional ground has been taken that the definition of "goods" embodied in the Madras General Sales Tax Act is *ultra vires* the powers of the State Legislature in so far as such definition goes beyond the definition of "goods" as found in the Constitution It would suffice to say at this stage that by a further counter-affidavit filed by the respondents, the validity of this attack is questioned, and it is claimed that the Constitution-makers were not unaware of the enlarged definition of "goods" in the various Sales Tax Acts at the time when "goods" was defined for purposes of the Constitution It is urged, therefore, that the definition found in the Constitution is not exhaustive and the validity of the definition in the Sales Tax Act cannot therefore, be questioned.

Mr. V K. Thiruvenkatachari, learned Counsel for the petitioner, conceded in effect that copyright is a new form of property which has come to be recognised by law. This right was originally regarded as merely a negative right to prevent one person from appropriating the labour of another It was undoubtedly only after the enactment of the Copyright Act in England that copyright came to be regarded as a statutory right which right in the author of a work, for instance was statutorily protected. Even earlier it was held in *Smelting Company of Australia* v. *Commissioners*

of Inland Revenue[1], that a share in a patent and a licence to use it are property. An agreement for the sale of such share or licence was held liable to stamp duty under the relevant Act as if it were a conveyance on sale. Though the question arose in that decision more with regard to the location of the property than it was property does not appear to have been doubted at all In *Inland Revenue Commissioners* v. *Muller and Co.'s Margarin Limited*[2], goodwill was regarded as property, but it was pointed out in this decision that its legal conception as property involved the additional legal conception of existence somewhere *Mansell* v *Valley Printing Company*[3], which was rendered prior to the enactment of the Copyright Act in England pointed out that the remedy of a person against piracy was an action at common law, a suit in equity for injunction founded on the common law right It was by common law that copyright or protection thereof existed in favour of works of literature, art or science and the right of property of an author in his work was held to be incorporeal property *Copinger and Skone James on the law of Copyright* (ninth edition, page 1) points out that

> " Copyright law is, in essence, concerned with the negative right of preventing copying of physical material existing in the field of literature and the arts Its object is to protect the writer and artist from the unlawful re-production of his material It is concerned only with the copying of physical material and not with the reproduction of ideas, and it does not give a monopoly of any particular form of words or design It is thus to be distinguished from the rights conferred by patent trade-mark and design legislation . "

Salmond in his Jurisprudence, eleventh edition, refers to copyright as an example of a right over unmaterial property, which has been raised to the level of a legal right by statute (page 269) Copyright is referred to as an immaterial form of property recognised by law, being the product of human skill and labour or of a man's brains (page 462). In all the English text-books which it is unnecessary to refer at length, copyright has been regarded as incorporeal movable property and that view has been adopted in our country as well It would be sufficient to refer to *Savitri Devi* v. *Dwarka Prasad Bhatya*[4]

Proceeding on the basis that copyright is incorporeal movable property, the further contention of Mr V K Thiruvenkatachari, for the petitioner, is that in so far as Parliament provided for the legislative competence of the State Legislature to enact laws with regard to sale of goods, Parliament must, for reasons to be mentioned hereafter, have intended to restrict such competence only to concrete goods and not abstract goods or incorporeal goods such as property represented by copyright The Madras General Sales Tax Act (IX of 1939) defined "goods" as meaning,

> " all kinds of movable property other than newspapers, actionable claims, stocks and shares and securities "

A like definition was incorporated in the Sales Tax Act I of 1959. The expression all kinds of movable property would necessarily take within its sweep even intangible or incorporeal movable property The contention of the learned Counsel for the petitioner is that the legislative competency of the State Legislature in so far as the sale of goods is concerned must be governed by the interpretation that can be given to the expression "goods" as contemplated by the Constitution and the earlier Government of India Act, 1935 Entry 48 in the Seventh Schedule to the Government of India Act covers taxes on the sale of goods. Section 311 of that Act, which provides for the interpretation of the expressions used in that Act, defined "goods" as including all materials, commodities, and articles. The Constitution of India also provides in Entry 54 of List II for

> " taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92 (A) of List I."

Article 366 also defines "goods" as including all materials commodities and articles. The rule of interpretation is that wherever a statute uses the word "includes" in an in-

1 L R (1897) 1 Q B D 175.
2. L R (1901) A C 217.
3 L R (1908) 2 Ch 441.
4 I L R 1939 All 275

terpretation clause, it intends thereby to add something to what the natural sense of the word normally conveys If we turn to the dictionaries, goods are generally interpreted to mean movable property or merchandise, wares or things. When either the Government of India Act or the Constitution specified in the inclusive definition only the natural sense of the word, it is claimed that notwithstanding the use of the expression "includes," it nevertheless becomes practically exhaustive and the Constitution intended only to specify particular things as coming within the scope of the definition of goods. The words "materials, commodities and articles" must obviously connote only corporeal movable property and though there could be incorporeal movable property, the manner in which the word "goods" has been defined leaves no scope for extending the meaning of that expression to include incorporeal movable property To put it differently, the argument is that the word "includes" is employed in a definition to add to what the natural sense of the word conveys, but if the statute merely sets down only that very natural sense, the statute cannot be intended to have added to that natural sense It is said, therefore, that the very natural sense of the expression given as the intrepretation cannot be regarded as an extension, for "includes" is generally employed only for the purpose of extending the natural sense. In that view, it is said that definition of "goods" both in the Government of India Act and the Constitution must be regarded as being exhaustive

In a decision for the Privy Council in *Dilworth* v *Commissioner of Stamps*[1], an analogous question arose. In the Charitable Gifts Duties Exemption Act, 1883, a term "Charitable purposes" was defined as

"including devises, bequests and legacies of real or personal property"

The question arose as to what was meant by this definition. The Judicial Committee observed (at pages 105 and 106)

> "It is not said in terms that 'charitable bequest' shall mean one or the other of the things which are enumerated but that it shall 'include' them. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions"

This decision is no doubt authority for the position that the word "includes" may well be exhaustive in certain circumstances The decision does not, however, go further and lay down the circumstances in which such an exhaustive meaning should be given to that expression. It is true that it lays down that the word "includes" is generally employed for the purposes of extending the meaning of the expression over and above what the natural import of the word may be. That the word "includes" in a particular context may not extend the scope of the definition but really indicates means and includes, which usually implies an exhaustive definition is also the effect of the decision of the Supreme Court in *Singha Mall* v *Parduman Singh and others*[2]. In *Reynolds* v. *John*[3], the principle enunciated in the above Privy Council decision was applied In that Act which was under consideration, the definition of the expression "Loud speaker" as "including" amplifier or similar instrument came to be considered and the Queen's Bench decided that the word was used for the purpose of enlarging rather than restricting the meaning which might arise from the use of the word "Loud speaker" *simpliciter*. But a closer perusal of this decision clearly shows that conclusion was reached by reason of the use of the words "or similar instrument" occurring in the definition.

1. L R (1899) A C 99
2. Civil Appeal No. 16 of 1959.
3. (1956) 1 All E.R. 306.

Mr V. K Thiruvenkatachari has endeavoured to pursue this line of argument *viz*, that "goods" as defined both in the Government of India Act and in the Constitution must mean concrete articles by reference to certain other provisions In the Government of India Act, Section 137 provided for terminal taxes on goods carried by railway or air Section 297 enacted a prohibition against discrimination between goods manufactured in a Province and similar goods not so manufactured. The Constitution also refers to goods in Article 269 in providing for the levy of terminal taxes on goods carried by Railway, sea or air, or taxes on the sale or purchase of goods, and by Article 304 to prohibition on restriction of trade in respect of goods manufactured within or without the State The relevant schedules, the Seventh Schedule of the Government of India Act and the Seventh Schedule of the Constitution in providing for matters in respect of which the Union or the State may make laws, refer to goods and in the context in which that expression is used, it is the contention of the learned Counsel that only concrete goods could have been under contemplation For instance, in List I of the Seventh Schedule to the Constitution, Entry 30 deals with carriage of goods by railway, sea or air, Entry 84 with duties of excise on goods manufactured Entry 89 with terminal taxes on goods carried by railway, sea or air, and Entry 92 (A) with taxes on the sale or purchases of goods other than newspapers where such sale or purchases takes place in the course of inter-State trade or commerce. List II also provides by Entry 27 for the production, supply and distribution of goods, Entry 51 for duties of excise on goods manufactured, Entry 52 for taxes on the Entry of goods into a local area, Entry 54 for taxes on the sale or purchase of goods, Entry 56 for taxes on goods carried by road, etc The Concurrent List mentions in Entry 32 the carriage of goods on inland waterways and provides by Entry 33 for trade and commerce in and the production, supply and distribution of goods The argument proceeds that in all of these entries in the relevant sections of the Government of India Act or the Articles of the Constitution, concrete goods are contemplated The very nature of these provisions shows that it cannot be otherwise and the word goods cannot in the context include incorporeal movable property It is also urged that in all sales tax legislation, the situs of the goods is a necessary element to be taken into consideration which in relation to incorporeal movable property would be more or less meaningless

Proceeding on this line of argument Mr. V. K. Thiruvenkatachari urges that when Parliament was legislating on the subject, it could not have been unaware of the fact that the English law had its own categories of goods such as chattels, chose in action, personal property and the like, but that in employing the word goods while at the same time being aware that goods could embrace both corporeal and incorporeal movable property, Parliament deliberately restricted it to mean only corporeal movables as indicated by the instances cited above. The decision of the Supreme Court in *Madras State* v. *G. Dunkerly & Co.*[1], has also been referred to, where the Supreme Court decided that the expression " sale of goods " in Entry 48 in the Provincial Legislative List in the Seventh Schedule to the Government of India Act, 1935, should not be construed in its popular sense but in its legal sense and proceeded to consider what that legal sense is. They observed thus (at page 573):

> " The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law."

They accordingly repelled the contention that it was open to the legislating authority to include in the expression "sale of goods " an agreement of sale relating to one kind of property and a sale as regards another which in effect was the extended definition

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1 (1958) S C J. 696 : (1959) S C R 379 : (S.C.) 66 : A.I R. 1958 S.C. 560. (1958) 2 An.W.R. (S.C) 66 . (1958) 2 M.L J.

of sale occurring in the Sales Tax Acts, whereby sale was defined so as to include materials used in the construction, fitting out, improvement or repair of immovable property. But the more important part of this decision, is, in so far as the arguments of the petitioner are concerned, that when Parliament enacts a statute it should be deemed to have employed an expression in that statute which has acquired a legal as well as a settled meaning in law. The same argument is advanced as regards the meaning of the word goods.

The learned Advocate-General urges that the word "includes" in the definition sections cannot be regarded as exhaustive. He points out that in Article 366 of the Constitution, wherein several expressions stand defined, Parliament has used both "means" and "includes" in various definitions. Parliament could not, therefore, have been unaware of the fact that normally "means" is exhaustive, while "includes" is not. Nor could Parliament have been unaware that long before the Constitution was enacted in 1950, there were several sales tax laws in the country where "goods" was defined to mean all kinds of movable property. It should equally have been aware that movable property did include property of all description, that is to say, not only stocks and shares, but trade-marks, patent rights, goodwill and choses in action, for goods had been defined in an all embracing manner as every kind of movable property in the Indian Contract Act before that part of it dealing with sale of goods was taken out and enacted separately. It is claimed accordingly that read in the context of these features, Parliament could not have intended to exclude one type of movable property from the category of properties covered by the expression goods. If, in fact, Parliament had decided to restrict the meaning of the expression goods in any particular manner, would not Parliament have used the expression means rather than includes. It is urged that for all these reasons, the expression includes cannot be regarded as embodying an exhaustive definition of the terms sought to be defined and that it should be taken not to exclude other kinds of movable property for goods in effect means movable property in contra-distinction to immovable property.

Giving the matter our careful attention, we find it difficult to agree with the argument of the learned Counsel for the petitioner that goods has been defined in the relevant Article of the Constitution in an exhaustive manner It may be that in so far as incorporeal moveable property is concerned, there might be difficulties in levying the appropriate tax such as those contemplated in Entries 30, 84, 89 of List I, or Entries 51, 52 or 56 of List II of the Seventh Schedule of the Constitution But that cannot control the definition in any way. Notwithstanding the fact that the expressions employed in defining goods embody only the natural sense of the word, we are unable to hold that goods as defined has been restrictively defined and to comprise only materials, commodities and articles that is to say, concrete goods. We would require far stronger reasons before we can accept the contention that the Constitution has imposed a restriction on the power to legislate in respect of sales of one class of movable property. In so far as the argument purports to establish that the definition of goods in the Madras General Sales Tax Act as meaning all kinds of movable property goes beyond the meaning of the expression given to it by the Constitution and for that reason the legislation in respect of sales or purchase of goods other than concrete goods is *ultra vires* we are unable to agree with that contention.

What appears to us to be a more vital part of the argument is whether even assuming that the transaction in question amounts to a transfer of some kind of property, it nevertheless comes within the scope of the definition of sale of goods under the Madras General Sales Tax Act In order to examine this contention, we have firstly to refer to the arrangement entered into between the assessee (lessor) and the lessee, with whom the engagement was entered into We have to scrutinise the terms of the agreement and examine also the interpretation placed upon these terms by the Sales Tax Authorities In the agreement which is relevant to Writ Petition No. 782 of 1966 (the other agreements are similar) the following provision finds place. The assessee is admittedly the sole owner of the entire property in the

film which was the subject-matter of the agreement The agreement was that the assessee should make over to the lessee,

> " the outright lease of the world negative rights of the said film for a period of 49 years . for a consideration amounting to the declared cost of production of the film plus 15 per cent thereon as profit to the producer, subject in any case to a minimum price of Rs 10,00,000, payable by the lessee to the producer "

Thereafter, the conditions upon which the lease was to operate are set out Clause 4 (*c*) provides that as the lessee had undertaken unconditional liability to pay the basic price of Rs 10,00,000, the lessee was entitled to hold until the expiry of the period of the lease the entire world negative right without any lien thereon to the producer, that is, the assessee Clause 4 (*d*) indicates the nature of the rights so given to the lessee as,

> " the rights shall comprehensively include during and throughout the period of the lease all such rights and privileges as are given or reputed to be given by the proprietor of the world negative rights of a film to the sole and exclusive distributor of the world negative rights of the film "

Under clause (4) (*e*), the right of the producer assessee is limited only to recovery of the unpaid consideration stipulated and excludes any right on his part to get back or claim possession of the positive copies or copy of the negative The sub-clause is amplified by the following sub-clause 4 (*f*), which, in view of the special reliance placed thereon on behalf of the respondents, is set out in full below

> " The positive prints of the film shall throughout the period of the lease be the property of the lessee and it agrees to use them only in the manner authorised expressly or impliedly, by this agreement, and the lessee agrees to return at the determination of the lease to the producer all the concerned positive prints then remaining with it in their then condition The negative of the film shall remain in the custody of the producer throughout the lease period exclusively as the agent and the custodian of the lessee free of any charge for keeping custody and it is expressly understood that the producer cannot during the continuance of this agreement make use of the negative in any manner whatsoever other than for the purpose of taking out extra prints as and when required by the lessee against its paying producer the entire charges for such prints or supplying the requisite raw film and paying charges for taking the prints as the producer may ask at the time."

It is seen from this clause that the negative of the film from which positives are made for the purpose of projection in the cinemas is kept with the producer That the property in the ngative vests in the lessee during the continuance of the lease is made clear herein, for the producer maintains custody of the negative only as the agent and the custodian of the lessee and is prohibited from making use of the negative except for certain stated purposes There is also the obligation cast upon the lessee to return to the lessor on the determination of the lease, all the positive prints then remaining with it It also appears from this clause that notwithstanding the lessee's ownership of the film negative during the period of the agreement, the lessee undertakes to take the requisite copies made only in the laboratories of the lessor, undertaking also to pay the charges thereof That appears to be a special term of the contract apparently for the reason, that the lessor maintains laboratories in which the films both negatives and positives are processed and carries on a business of that description apart from the production of films.

It is the contention of the Department that this agreement operates in effect as an outright sale of the film in question by the assessee to the so called lessee The order of the Deputy Commercial Tax Officer, which dealt with the contentions of assessee, is in its operative part, very short, and is extracted below

"A negative of a film is goods and is movable property Thus, the transfer of film has to be considered as sale There are two parties to the transaction and they are Sri A V M Production and Sri A V M Limited The ownership is also transferred to Sri A. V. M Limited, as the material clauses of the agreement would indicate that the alleged lessor will not be entitled to get back or claim possession of the negative copy and the lesseee's liability shall be only for unpaid purchase money as agreed Further, the lessor while the film is in his custody, will be only the agent and custodian of the film. Thus the producer has transferred the ownership of the film to the other party of the agreement. Further, the normal life of a film being less than three years, the period of 49 years mentioned in the agreement does not appear to conform to facts"

On this reasoning, the Sales Tax Authority held the consideration stipulated in the agreement to represent a sale of goods within the meaning of the Sales Tax Act

It will be thus seen that the principal features relied upon by the Department in holding the transaction to represent a sale of goods are (*i*) the fact that the lease is for a period of 49 years, while the normal life of the film is only three years, so that the lease is in effect an illusory colour given to the transaction; (*ii*) that the negative has become the property of the lessee, the lesser not being entitled to obtain the return thereof; (*iii*) though this reason does not find place in the order impugned, the learned Advocate-General, in the course of his argument, contended that the consideration stipulated being based on the declared cost of production of the film plus 15 per cent thereon as profit to the producer subject to a minimum also, indicates that it was an outright sale that was contemplated and not only a lease.

Before examining these contentions, we feel it necessary to examine the rights which the producer of a film gets under the law

It is well recognised that such rights in relation to cinematograph productions are governed by the statute at the present time, in whatever manner they may have been characterised in the past Section 2 (*d*) (v) of the Copyright Act XIV of 1957, defines "au hor" to mean in relation to a cinematograph film the owner of the film at the time of its completion A conematograph film includes the sound track The further parts of this section define what an "exclusive licensee", and an "infringing copy" or a performance" mean in relation to cinematograph films Under section 13 of the Act copyright is declared to exist throughout India in words, such as cinematograph films and records Section 14 lays down what is meant by copyright It means in the case of literary, dramatical or musical work the exclusive right by virtue of the provisions of the Act to make any cinematograph film or a record in respect of the work In the case of the copyright in a cinematograph film, it means the exclusive right to cause a film, in so far as it consists of visual images, to be seen in public and in so far as it consists of sound to be heard in public. There are other rights comprehended in the copyright in the case of a cinematograph film, which find place in section 14 (1) (*c*) and (*d*), to which we shall refer later in due course Section 17 states that the author of a work shall be the first owner of the copy right, "work" in this connection meaning the cinematograph film. There is no doubt that in the circumstances of this case, the lessor-assessee is the author of the work, *viz*, the cinematograph film in question Section 18 provides for assignment of copyright. The owner of the copyright in an existing work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof Upon such assignment being made, under section 18 (2) the assignee becomes the owner of the copyright as respects the rights so assigned and the assigner continues to be the owner in respect of the rights not assigned Section 19 requires an assignment of copyright in any work to be in writing signed by the assignor. Section 26 provides the life-time of the copyright to be fifty years Apart from assignment of copytight which is provided by section 18, section 30 enables the owners of the copyright to grant any interest in the right of licence in the work. Chapter XII provides for civil remedies in cases of infringement of copyright

Section 57 of the Act reserves the right of an author, independently of the author's copyright and even after he has assigned such copyright wholly or in part to prevent distortion, mutilation or modification of the work or any action in relation to that work, which might affect the author's reputation

That the owner of a cinematograph film is an author within the meaning of the Act, who acquires a copyright in his production which enures for a period of 50 years, is thus beyond question He is competent to assign that copyright and all the bundle of rights which that expression connotes to any other person wholly or in part with or without limitations for a term or for the full period That this bundle of rights includes something more than the mere exhibition of the film to the public is apparent from section 14, which states that in the case of a cinematograph film, the expression copyright includes the right to make a copy of the film, to cause the film to be seen in public and to be heard in public, to make a record embodying the recording in any part of the sound track associated with the film by utilising such sound track, to communicate the film by radio-diffusion, and in the case of a record, whether made originally or as part of the right included in the making of the cinematograph film, to make any other record embodying the same recording to cause the recording embodied in the record to be heard in the public and to communicate the recording embodied in the record by radio-diffusion It will be seen that out of this bundle of rights, the conferment of a lease for the purpose of the distribution, which is what is contemplated in the leases in the present cases, covers only one part of the several rights which the owner has Notwithstanding the lease that has been granted in these cases, it would be open to the owner to make a separate record of the sound track in the film or to communicate the film by radio-diffusion, that is to say, television and the like the only right which the lessor-assessee has granted to the lessee in the instant cases would appear to be the right to have the film exhibited as a distributor together with the ancillary right of making or causing to be made positive prints for purposes of exhibition and no further right is given to him

The question that we have to examine is whether the grant of the lease for exploiting the film by distribution for purposes of exhibition to the public amounts, in what are claimed to be special circumstances of the case by the Department, to a sale of goods Before adverting to these special circumstances relied upon by the Department, we may turn to the terms of the agreement. What purports to be granted by way of lease are "the entire world negative rights" of the film and those rights are defined in the relevant clause 4 (*d*) of the contract in this manner

> " The rights shall comprehensively include during and throughout the period of the lease all such rights and privileges as are given or reputed to be given by the proprietor of the world negative rights of a film to the sole and exclusive distributor of the world negative rights of the film "

A further clause 4 (*d*) enables the lessee with effect from the date of the agreement to be at liberty to make with third parties agreements and contracts of sub-lease, distribution, etc , in respect of the said film, but no such contracts can enure beyond the period of the lease covered by this agreement. The terms of the contract have to be interpreted in the light of what is generally understood in the trade It does not appear to be in dispute that normally speaking the proprietor of a film enters into engagements with other parties for exhibition of the film. Such arrangements may be by way of an outright conferment of the sole and exclusive right to exhibit the film in any area, or the proprietor may enter into diffrent engagements with different parties covering the exhibition in different areas The other contracting party either exhibits the film himself in his own theatre or enters into sub-contracts of a similar nature If the lease granted covers only the distribution rights, what incident there is in a contract of that description which would convert it into a sale of goods is exceedingly difficult to conceive Instead of the owner or the proprietor exhibiting the film himself, he confers that right of exhibition upon another party. If the matter stood there, there can be no dispute that no sale of any goods is involved

notwithstanding that for the purposes of enabling exhibition of the film, positive prints of the film would have to be provided by the proprietor to the exhibitor. It is obvious that a contract of that description would call for the supply of positive prints and it is here that the Department claims that really a sale takes place and not a mere lease of the right to exhibit The contention is advanced in this manner based upon certain clauses of the agreement.

For the consideration of the lease of the entire world negative rights, the distributor agrees to abide by the following conditions. One is that,

> " the positive prints of the film shall throughout the period of the lease be the property of the lessee and it agrees to use them only in the manner authorised expressly or impliedly by this agreement and the lessee agrees to return at the determination of the lease to the producer all the concerned positive prints then remaining with it in their then condition. The negative of the film shall remain in the custody of the producer throughout the lease period exclusively as the agent and the custodian of the lessee free of any charge of keeping custody and it is expressly understood that the producer cannot during the continuance of this agreement make use of the negative in any manner whatsoever other than for the purpose of taking out extra prints as and when required by the lessee against its paying the producer the entire charges for such prints or supplying requisite raw film and paying the charges for taking the prints as the producer may ask at the time."

This clause envisages that the negative of the film, which is the master copy from which positive prints are taken from time to time, shall remain in the custody of the producer only as the agent and custodian of the lessee. From this clause the learned Advocate-General, for the Department, contends that the property in the negative regarded as goods has passed to the lessee. We do not think that this is a proper construction of the clause, and in putting forward this argument we feel that the learned Advocate-General is not taking the clause as a whole and examining the purpose for which such a condition was put in This has to be read along with other parts of the clause which clearly show that the producer is prohibited from making use of the negative for purposes other than that of making of copies for the benefit of the lessee for the carrying out of the agreement with regard to the distribution and exhibition It also appears that the lessor as a film producer has laboratories for the purpose of processing films and making prints and what may be called a separate incident of the contract is included herein, namely, that notwithstanding that the lessee has acquired the world negative rights, he cannot go to any other laboratory for the purpose of making prints The producer lessor has accordingly imposed a condition that the benefit arising from making positive prints shall go to him This is probably for the purpose of enabling the lessor's other part of the business, namely, running of the cinematograph laboratory to function. The apparent transfer of ownership of the negative of the film during the period of the lease read in the light of the prohibition upon the lessor that he should not make use of the negative in any manner other than for the purpose of fulfilling the terms of the agreement and the further fact that this part of the clause is also expressly intended to operate only during the lease period indicates to our minds that the property in the film regarded as goods did not stand transferred to the lessee. This clause only reiterates the scope of the respective rights, the right of the lessee to demand and obtain positive prints as and when he requires and the prohibition upon the lessor not to deal with the negative of the film in any manner whatsoever except for the purpose of providing the lessee with copies of the positive films during the currency of the lease It is also not denied by the Department that a positive print of a film when used for the purpose of exhibition in the theatres has a very short span of life and after the film has run for a certain number of times, it is worn out and has to be replaced, and it is to secure such number of copies as the lessee may require on payment of the charges that this clause has been introduced. It does not to our minds connote the sale of the negative at all.

That after the expiry of the lease period the lessee will have no further rights even with regard to the negative is clear from this clause If the intention of the parties was to transfer the property in the negative to the lessee, the wording of the clause is singularly inappropriate for the purpose. Another clause (4) (*e*) reads thus :

"Any failure or default on the part of the lessee in the carrying out of this agreement shall not entitle the producer to get back or claim possession of the positive copies or copy of the negative , but the lessee's liability shall be only for the unpaid consideration money as agreed to and abovestated "

The Department relies upon this clause as well and urges that if the producer cannot get back or claim possession of the positive copies or copy of the negative but can only demand from the lessee the unpaid consideration stipulated, it should follow that the property in the positive copies or the copy of the negative has become that of the lessee Here again, it seems to us that to look at a single clause of a comprehensive agreement and to arrive at the intention of the parties is not a proper method of interpretation of a contract The earlier clauses specify for a stipulated consideration and that consideration which is in the nature of a guaranteed minimum of Rs 10,00,000 is to be paid thus Taking the agreement in respect of the film *Pooja Ke Pool* entered into on the 26th November, 1962, the relevant clause states that a sum of not more than Rs 2,00,000 shall be paid before the end of 31st of December, 1962, and thereafter not more than Rs 1,00,000 during any calendar month and the balance if any, out of the Rs. 10,00,000 to be paid on the date of the censor certificate. It would appear, therefore, that this guaranteed minimum is expected to be paid even before the lessee is in a position to exhibit the film. It is clear from the other terms of the agreement as also from the rules under the Cinematograph Act that a film cannot be exhibited before a censor certificate is obtained and another clause of the agreement provides that the producer shall obtain the necessary censor certificate and deliver over to the lessee such certificate along with a positive print of the film within two years from the date of the agreement On the producer's failing to do so, the lessee is entitled at his discretion to treat the agreement as cancelled without prejudice to his rights to claim damages, etc But even before the producer obtains the necessary censor certificate, the lessee is enabled as from the date of the agreement itself to enter agreements or contracts of sub-lease, distribution, etc , with third parties. It is in the light of these provisions that the clause extracted earlier has to be understood The failure of the lessor or the lessee in carrying out the agreement cannot obviously endanger the other contracts which the lessee might have entered into with third parties for the purpose of distribution and it is only in order to safeguard such third parties, rights that the above clause lays down that solely for the reason that the lessee might have failed to pay an instalment of the consideration or on account of some other failure, the producer cannot back out of the contract and obtain possession of the positive copies or the copy of the negative The producer accordingly agrees that he will restrict his right to the recovery of the guaranteed minimum consideration and shall not interfere with any other arrangements which the lessee might in the usual course of his business have entered into This clause is again related to an earlier clause, which states :

" It is hereby expressly agreed that in consideration of the lessee's unconditional liability to pay as the basic minimum price Rs 10,00,000 the lessee has become and is entitled to hold forthwith and to continue to hold until the expiry of the period of the lease, the entire world negative rights as aforesaid without any lien thereon to the producer."

Clearly, what is contemplated is that having once conferred the right of distribution and exhibition to the lessee and having permitted the lessee to enter into other engagements of a like nature, the lessor is prevented from claiming any lien on the world negative rights and his rights are restricted only to recovery of the consideration money. In the nature of things and particularly in view of the nature of the

trade, it seems to us that these clauses do not establish the contention of the Department that they connote an outright sale of the negative of the film regarded as goods along with the other right connected with it by way of distribution or exhibition

Nextly, it was urged that the manner in which the consideration was arrived at, itself indicates an outright sale. The relevant clause states that the consideration shall be computed as.

> "the total of (*a*) the amount of the producer's declared cost of the film plus (*b*) the profits to the producer of 15 per cent. of the declared cost, subject in any case to a minimum price "

The expression "declared cost" has been defined. It is claimed by the Department, that when the producer seeks to obtain, a certain specified percentage of his cost of production as his profit, it is more or less in keeping with the idea of a sale of manufactured goods and from this feature, the concept of sale is sought to be spelt into the transaction We are unable to agree. Once again, we have to consider the nature of the trade. One is well aware that films have a more or less chancy career depending upon the popular taste at the time. It may well happen that a film produced at an enormous cost proves a flop and the risk attendent upon catering to the public taste is minimised by the producers of films by distributing the risk as it were by entering into arrangements of this kind The aim of any producer is to recover the amount which he has sunk into the production of the film and if he guarantees it by entering into an arrangement of this nature by providing a return of a percentage in addition to the cost that went into the making of the film, can one say on that ground alone that what was intended was a sale of the film itself ? We are not satisfied that this view pressed before us by the Department is a reasonable interpretation to place upon a transaction of this kind

In buttressing this argument that what is really contemplated is not a lease of a right to exploit but an outright sale of the copyright in the production regarded as incorporeal movable property, reliance is placed by the Department upon its assertion that what may be called the marketable value of the film becomes nil at the end of three years In the counter-affidavit, it is said that,

> "the value of a film is completely wiped out by exhibition in the course of ten years or so."

The impugned order says that the normal life of a film is less than three years. If the film as an exploitable commodity has no value beyond a period of three years, the apparent tenor of the transaction as a lease to exploit the right of the owner of the copyright is in substance only an outright sale of all such rights of the owner so it is argued. In support of this argument, reliance is placed upon the fact that under the Income-tax law, depreciation of the value of the film as an income earning asset is allowed over a period of three years only and thereafter the Income-tax Department treated the book value of the asset as having been completely exhausted by such depreciation It seems to us that the procedure adopted by the Income-tax Department for a particular purpose cannot give any clue to the real nature of the transaction between the lessor and the lessee. On the other side, it is equally emphatically urged that where a statute recognises a right in the owner of a copyright to enure for as long a period as fifty years and in fact provides for the protection of such a right, it would be illogical to claim that the value of the property becomes nil at the end of a much lesser period Virtually, this argument of the Department would equate the right of the owner of the copyright to the actual material that is produced by him What is contemplated by the arrangement between the parties is only the supply of certain material to the lessee in order to serve the exploitation of the right of the owner in the copyright of the film If the argument of the Department is accepted any lease transaction such as mere hire even for as short a period as say five years must be regarded as a sale, solely for the reason that that period is in excess of the period of three years, which the Department alleges is the normal life of a film It is also easy to see that the mere sale of a film regarded as material to another person by the owner of the copyright would count for nothing at all unless there is

the conferment of a right to exploit the film In a transaction of this kind, it is this latter right which is more valuable and the supply of the film is ancillary to the exercise of that right We are, therefore, unwilling to accept this argument based upon income-tax procedure as leading to any positive conclusion. It seems to us therefore, that even if copyright is regarded as a species of movable property, the transactions in question do not connote sales at all

Since no element of sale is involved, the taxing provisions of the General Sales Tax Act have no application at all

Though the above conclusions would serve to dispose of the main question raised in these writ petitions, we may nevertheless deal with the subsidiary question which relates to the quantum of tax What the Department has done is to impose a tax on the basis of the entry in the First Schedule to Act I of 1959 at the rate of 10 per cent. Brief reference to certain provisions of the Act is necessary in order to appreciate the contention Under section 3 of the Act, levy of tax on the turnover of sales or purchases of dealers is provided for in respect of the general mass of goods at 2 per cent. (since raised to 2½ per cent.) of the total turnover of an assessee, which is not less than Rs 10,000 The levy of tax provided under section 3 (1) of the Act as above is a multiple point levy, that is to say, on every occasion when the same goods suffer sale or purchase at the hands of a dealer, tax is leviable on the turnover, subject to a certain minimum turnover which stands exempted. Section 3 (2) of the Act, however, specifies a class of particular goods in respect of which the tax is leviable from the dealer only at a single point and at the rate specified in the First Schedule to the Act The rate of tax in the case of these goods is higher, standing at present after the latest amendment at 11 per cent of the turnover. The contention advanced by the petitioner in these cases is that photographic films are listed in the Schedule as goods in respect of which single point tax is leviable under section 3 (2) of the Act Obviously, when the film is purchased by the petitioner, it would have suffered tax under this entry It is a matter for verification, if necessary, whether any particular purchase has so suffered tax or not For the purpose of the arguments, we shall assume that the purchase by the petitioner, which involves a sale to him by the dealer, has attracted levy of tax under this provision If an article listed in the Schedule has so become liable to tax, then the law protects from imposition of tax every subsequent transaction in respect of that article by way of sale or purchase by a dealer. What the Department has done, however is, that treating these lease transactions as sales of the films for the consideration stipulated in the lease arrangements, it has sought to impose tax at the rate specified in the Schedule in disregard of the fact that it has suffered tax under the First Schedule as a sale of the raw film Objection is taken to this and it is contended that having regard to the underlying intent and the scope of the entry in the Schedule, exposed films cannot be brought within the scope of taxation contemplated by section 3 (2) of the Act. Either it remains a film even after having been exposed, in which event having been already subjected to tax at the point of first purchase or sale as a raw film, a subsequent sale is not taxable under the Schedule; or the entry in the First Schedule relates only to raw film, having regard to the underlying intent of the enactment, in which event also, the processed film is no longer film within the meaning of the entry and liable to be taxed under the Schedule It is urged that this view is preferable, for on a contrast of similar provisions in the preceding Act of 1939, it would appear that only raw film was intended to be taxed under the single point system. We may, however mention that the pattern of taxation of similar articles under Act IX of 1939 was different and we cannot interpret the provisions in Act I of 1959 by any reference to the earlier Act.

The word film occurs in two entries in the Schedule Entry No 6 reads

"Cinematograph equipment including cameras, projectors, sound recording and reproducing equipment, lenses, films and parts and accessories required for use therewith."

Entry No 7 reads

> "Photographic and other cameras and enlargers, lenses, films, plates, paper, cloth and other parts and accessories required for use therewith"

It is difficult, we have to concede, to draw any inference of a conclusive nature from the contents of the two Entries. In Entry No 7, where the word films is used in connection with photographic and other cameras, one may well feel that the word film herein might sensibly denote the raw film But when the word film is used along with the expression, 'Cinematographic equipment including cameras and projectors' it may equally denote the positive print of a film which is required to be exhibited by means of the cinematographic equipment. The learned Advocate-General presses this view for our acceptance According to him, the raw film is entirely different from the exposed film and is a different commodity altogether, but nevertheless it continues to be a film. The raw film may be taxable under the single point system as a film. The positive film also would continue to be a film and would still fall within one or other of the two entries But it is no longer the same film that had undergone tax earlier ; so that it cannot be said that the principle of the single point taxation is outraged by taxing the exposed film again under the Schedule He has referred to decisions which have dealt with tobacco in its raw and manufactured state and urged for our acceptance the view that since the manufactured object is different from the original object, the taxation of the sale of a manufactured object, though it may still fall within the same category once again under the single point system, is not opposed to law In *Gokaldas & Co* v *State of Gujarat*[1], a similar question arose with regard to taxation of tobacco and its manufactured form as beedi tobacco. Again in *State of Madras* v. *Swastic Tobacco Factory*[2], tobacco had been manufactured into chewing tobacco and sold , and the claim was made that the excise duty paid on the raw tobacco should be allowed on a deduction with turnover of sale of chewing tobacco. The Supreme Court held the goods sold to be different from the goods on which excise duty was paid and that the deduction was not allowable In contrast we may refer to *Tungabhadra Industries* v *Commercial Tax Officer*[3]. That was no doubt not a case of the levy of tax But the question arose whether when the manufacturer of vanaspati sold vanaspati, he was entitled to a deduction of the value of the groundnut oil purchased by him and upon which he had paid tax, from his gross turnover of the sales of oil The Department's contention in that case was that vanaspati was a different object altogether and that it was only when groundnut oil was sold as such that the manufacturer was entitled to the deduction contemplated by the rules. But the Supreme Court pointed out that though by a process of manufacture groundnut oil might have been converted into vanaspati, it still remained groundnut oil for all purposes and that the deduction was available to him We have already indicated our reasons for holding that an exposed film is in the light of the entries in the First Schedule to Act I of 1959 a different article from a raw film

Mr V.K. Thiruvenkatachari has invited our attention to the report of Dr P S. Lokanathan based upon which the old Act of 1939 was replaced by Madras Act I of 1959 In this report, in recommending certain commodities for single point levy, the learned expert has listed cinematographic, photographic and other cameras, projectors, etc , and films, plates, paper and cloth required for use therewith and noted :

> "These commodities are now taxed at multi-point with an additional single point at 2 per cent The dealers in this commodity could be located easily Hence these could be brought under the single point system There are about ten wholesale dealers and importers in these goods in the State"

1. (1966) 17 S T C 138
2. (1966) 1 I T J 537 (1966) 1 An.W R (S C) 142 · (1966) 1 M L J (S C) 142 · (1966) 1 S C J 627 : I A R (1966) S C 1000.
3. (1961) 1 S C J 272 (1961) 1 An.W R. (S C) 45 · (1961) 1 M L J (S C.) 45 : (1961) 2 S C R 14 · A I R. 1961 S C 412

It is urged by Mr V K Thiruvenkatachari that when the law was amended on the basis of the recommendations contained in this report, it was obviously intended that the articles suggested for single point levy should suffer tax at the hands of wholesale dealers or importers when they sold the goods and thereafter be free of any tax in respect of any subsequent transaction. If we could have any assurance that the recommendations made by the learned expert were followed without any deviation, this argument would no doubt be sound We are, however, unable to hold either on the basis of that report or on the basis of the actual form which the legislation took with regard to films that an exposed film was not intended to be taxed solely for the reason that the raw film was liable to a single point levy

One further question of considerable importance is the levy of penalty under section 12 (3) of the Act. In the order of the Deputy Commercial Tax Officer relevant to 1964-65 assessment, which is the subject-matter of Writ Petition No. 782 of 1966, after overruling the objections that the transaction was not liable to tax as a sale of goods, the officer proceeded to say :

> " A penalty of Rs. 6,66,251, being 1½ times the tax due under section 12 (3) of the Act for not disclosing a turnover of Rs. 44,41,674 14 in the A-1 return is also levied as proposed "

On behalf of the petitioner, the validity of section 12 (3) itself is brought into question. There are two provisions in the Act which enable the taxing authorities to levy a penalty Section 12 of the Act by sub-section (1) provides that the assessment of a dealer shall be on the basis of the prescribed return relating to his turnover submitted in the prescribed manner within the prescribed period Sub-section (2) states that if no return is submitted by the dealer or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority, shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment There is a proviso which requires the assessing authority to give a reasonable opportunity to the assessee Sub-section (3) reads thus :

> " When making any assessment under sub-section (2), the assessing authority may also direct the dealer to pay, in addition to the tax assessed, a penalty not exceeding one and a half times the amount of tax due on the turnover that was not disclosed by the dealer in his return or, in the case of failure to submit a return, one and a half times the tax assessed, as the case may be "

It is seen from this provision that if a dealer fails to submit a return, the assessing authority may assess him to the best of its judgment In such case, in addition to the tax imposed, the assessing authority may impose a penalty of 1½ times the tax But in a case where the assessment appears to the assessing authority to be incomplete or incorrect, the authority gives the dealer an opportunity of proving the correctness or completeness of the return, and after a hearing of that nature, if the assessing authority finds that any part of the turnover was not disclosed by the dealer in his return, a penalty not exceeding 1½ times the amount of tax due on such undisclosed turnover may be imposed This provision accordingly requires the assessing authority to determine the quantum of the turnover that was not so disclosed by the assessee Turning now to section 16 of the Act, which deals with assessment of escaped turnover, certain vital differences are seen to exist therein. Under sub-section (1) where any turnover in whole or in part has escaped assessment or has been assessed at a rate lower than that at which it is assessable, the assessing authority has jurisdiction to assess the tax payable after service of notice on the dealer and after making such enquiry as is necessary That he could do within a period of five years from the expiry of the year to which the tax relates Sub-section (2) provides for the imposition of a penalty and a penalty not exceeding 1½ times from the tax so assessed is leviable in case the assessing authority is satisfied that the escaped assessment is due to wilful non-disclosure of assessable turnover by the dealer. The mere fact that the turnover has escaped assessment does not invite the imposition of the penalty Under this provision, the assessing authority has to find that there has been an evasion of the tax due to wilful non-disclosure of turnover which should

have been disclosed Section 12 (3), on the other hand, does not appear to require any such finding of wilful non-disclosure in the return. The mere fact that some item of turnover has failed to be included in the return would appear to confer upon the assessing authority the jurisdiction to impose a penalty. It seems to us that even in the case covered by section 12 (3) of the Act, deliberate non-disclosure is really contemplated. The section refers to the imposition as a penalty and a penal provision of this nature cannot have been intended to apply to cases other than where a deliberate concealment by non-disclosure is involved But, on the question whether such a provision is unconstitutional we are unable to agree with learned Counsel. It is well recognised that a power to penalise evasion of tax which is lawfully due is ancillary to the taxing power and the provision cannot, therefore, be struck down On the further part of the argument of the learned Counsel that mere non-disclosure cannot invite the levy of penalty, we agree Having regard to the underlying intent of the section, it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to evade the tax It can hardly be that the Legislature thought that an innocent omission by oversight or some such reasons should still invite penal consequences

The question that we have to turn to now is whether the order of the assessing authority imposing the penalty in this case is a proper exercise of the judicial discretion of that authority. It is contended on behalf of the petitioner that till these impugned orders, were passed, both the Department and the assessee doing business of this description were rightly under the impression that such transactions did not involve any sale element It appears that the question of an assessment of a like nature came before the Sales Tax Appellate Tribunal in 1956 In that case, the assessee who was a producer of films received a sum of Rs 2,85,000 in connection with the assignment of the distribution rights of a cinema picture He was assessed to tax as on a sale of goods He took the matter in appeal to the Sales Tax Appellate Tribunal which examined the matter and came to the conclusion that arrangements of that kind contemplated in substance an assignment of incorporeal rights

"And that the portion of it, if any, relating to the transfer of movable property for valuable consideration is relatively very insignificant."

It is common ground that subsequent to the decision of the Tribunal, the Department has not been bringing to tax literally hundreds of transactions of this nature The Sales Tax Appellate Tribunal is a body constituted under the Sales Tax Act and its appellate powers are outlined in section 36 of the Act It is the competent authority which determines appeals arising from the subordinate taxing authority Sub-section (9) of section 36 states that every order passed by the Appellate Tribunal under sub-section (3) shall, subject to the provisions of sub-section (6) of section 38, be final Section 38 provides for a revision to the High Court on a question of law from the order of the Appellate Tribunal and in the absence of such revision the law expressly confers finality upon an order of the Appellate Tribunal We are not saying that solely for the reason that the Appellate Tribunal took a certain view in certain appeals from it in 1956, the Department is not competent to levy tax on a transaction of a similar nature in another case It may be that the particular order of the Tribunal may not have been carried in revision to the High Court and in so far as the assessee in that particular case is involved, the Department may have no alternative but to accept the decision of the Appellate Tribunal But it is a point worthy of note that between 1956 when the Sales Tax Appellate Tribunal rendered its decision and the date on which these impugned orders were passed, everyone concerned, including the Department, was under the view that turnovers of this description were not liable to be included in the turnover of the dealer. It is in that context that we have to examine whether the levy of the penalty for non-disclosure of the alleged turnover in the return is justified

From what we have stated above, it is clear that the power to impose a penalty in respect of what the law considers a punishable shortcoming on the part of the assessee must necessarily be coupled with a duty to determine the nature of the fault sought to be penalised Indeed, section 12 (3) itself contemplates that the

penalty to be imposed is dependent upon the quantum of the turnover which was not disclosed by the dealers There may be cases where there is genuine dispute whether a particular part of the turnover is or is not liable to be included For instance, where a dealer has a turnover both under the local sales-tax law and under the Central Sales-tax Act, he may have brought a particular turnover under the return relating to one and not the other But the assessing authority may determine that the turnover is liable to be included in the other return That would be clearly a case where the assessing authority would not be justified in imposing a penalty for the non-disclosure of that turnover in one of the returns unless he finds some material to show that it was disclosed in the other return for certain ulterior purpose. There may also be cases where the very nature of the turnover as a sales turnover is disputed and so long as the dispute is based upon reasonable grounds which induced the dealer not to include that turnover in the return, no one can say that a penalisable fault was committed by the dealer by reason of the non-disclosure The power to impose the penalty for non-disclosure of any part of the turnover is not a routine act on the part of the assessing authority but one which invites the exercise of a proper judicial discretion on his part. When we look at the circumstances in which the assessing authority imposed the penalty or has issued notice to show cause why penalty should not be imposed—in these cases, we find in the back-ground the undeniable fact that turnovers relating to transactions of this kind were not being included in the several preceding years, obviously due to the decision of the Sales Tax Appellate Tribunal, and it is further seen that the Sales Tax Authorities did not in the preceding years insist upon the inclusion of such turnover. In these circumstances, we have no doubt at all in our minds that the action under section 12 (3) of the Act is wholly unjustified In any event since we have held that no sales turnover is involved, no scope for levy of penalty at all exists.

It follows that the petitioner is entitled to succeed in so far as the turnovers relating to these lease transactions are concerned, as also the imposition of the penalty. To that extent, the rule will be made absolute in Writ Petition No. 782 of 1966. There will be a writ of prohibition in Writ Petition No 783 of 1966 prohibiting the assessing authority proposing to include similar turnovers, and a similar prohibition in respect of the notice proposing to levy penalty. For like reasons, the provisional assessment will also be quashed. The petitioner will be entitled to his costs

V M K. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P RAMAKRISHNAN.

G. Sundararajan (Secretary, Thirukalukundram Road, Margin Hawkers' Association, Thirukalukundram .. *Petitioner**

v.

The Panchayat Board, Thirukalukundram represented by its Executive Officer, and another .. *Respondents.*

Madras Panchayats Act (XXX V of 1958)—*Licence fee from shops using the road margins—Additional income by levy and correlation to any extra expenditure—Not shown by Panchayat—No case of any extra expenditure for supervisory charges—Levy to be quashed.*

The Petitioner, Secretary of a Road Margin Hawkers' Association and himself a trader who through his agents and hired servants hawks vegetables and other articles on the road margins filed the writ petition under Article 226 of the Constitution for a writ quashing the resolution of a Panchayat levying a licence fee from shops using road margins

Held, The levy has to be struck down

The Panchayat Board has not made any attempt to show what additional income would be realised by the levy and whether it could be correlated to any

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* W.P. No 684 of 1966. 15th November, 1968.

extra expenditure etc , the Panchayat has to incur on account of the permission given to the hawkers on road margins '

The attempted explanation by mentioning the services rendered by keeping the road margin clean, keeping the public road lit, etc , covers only the existing obligations which the Panchayat has to discharge irrespective of whether there are hawkers who sell articles on the road margins or not There is no reference at all to any extra expenditure for supervisory charges

Circular No. 6 of the Inspector of Municipal Councils and Local Boards, dated 15th June, 1954 clearly makes reference to a judgment of the High Court in Writ Petition No 592 of 1953 *Venkata Varadhan* v *Executive Officer, Panchayat Board, Kallakurichi and another*, and directs the Executive Officer of Panchayats that they should take steps to discontinue the levy of licence fees for the use of road by carts or other vehicles in which articles for sale are transported or by hawkers who carry their wares on their heads The Panchayat Board in this case has contravened the above instructions The decision mentioned in the circular has made specific reference to hawkers who carry their wares on their heads or carts in which articles for sale on the road margins would also fall within the scope of the said decision and the principles laid down in it

There is no plea by the Panchayat that the levy is a tax On the other hand it is admitted to be a licence fee Therefore the decision of the Supreme Court in *Corporation of Calcutta* v *Liberty Cinema*, (1965) 2 S C R 477 A I R. 1965 S.C. 1107 is distinguishable

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High ourt will be pleased to issue a writ of *certiorari* calling for the records of the first respondent and quash the resolution No 189, dated 8th February, 1966 in so far as it relates to the levy on the road margin trade by hawkers

R. Sundaravaradan, for Petitioner

J. Kanakaraj, for 1st Respondent

The Court made the following

ORDER —The petitioner, G Sundararajan, is the Secretary of the Thirukalukundram Road Margin Hawkers' Association He has also described himself as a trader who through his agents and hired servants hawks vegetables and other articles on the road margins in Thirukalukundram He has filed this writ petition under Article 226 of the Constitution for the issue of a writ of *certiorari* quashing Resolution No 189 passed by the first respondent, the Panchayat Board, Thirukalukundram, represented by its Executive Officer The Resolution was confirmed by Revenue Divisional Officer, Chingleput when the petitioner appealed to him against the Resolution under the provisions of the Madras Panchayats Act (Madras Act XXXV of 1958) The impugned Resolution provides for the issue of an auction notice for collection of licence fee in the Thirukalukundram Town Panchayat weekly market, daily market stalls and from shops using the road margins. Then follows a list of areas where the auctionee would be permitted to collect the levy It also says that the auctionee may permit shops to be kept up to a margin of six feet on either side Then there is mention of the rate of levy from 1st April, 1966 per day as follows :

1.	Lorry which brings goods for sale	..	Re. 1-00 per lorry
2	Double bullock carts goods for sale	..	Re 0-50 per cart
3.	Hand cart goods for sale	.	Re. 0-15 per cart.
4.	Shops to be kept on road margins	.	Re. 0-06 per shop.
5.	Market stalls per day	..	Re 0-50 per stall

In the affidavit the petitioner has attached only that part of the above notice which provides for a levy of 6 paise per shop on shops to be kept on road margins in this Writ petition, but not the rest, presumably because he is interested only in the road margin shops According to him, the levy being in the nature of a fee, in order to validate it, it is essential that the Panchayat should render some service as *quid pro quo* to the licencee and further the rate should be correlated in a reasonable manner to the cost of rendering such service But, according to him, no service is afforded, as *quid pro quo*, for the levy, and further, no extra cost has been incurred by the Panchayat for the purpose of affording that service As against this contention, in the counter-affidavit of the first respondent, Panchayat Board, it is not denied that the levy is a 'fee' But it is alleged that the Panchayat has to incur expenditure for attending to "the sanitation and cleanliness on the road margins, if the road margins are used for vending articles" As regards the plea that there is no expenditure incurred by the Panchayat for providing this additional service and there is no correlation between that expenditure and the licence fee, the counter-affidavit states :

> "It is incorrect to say that there is no *quid pro quo* for the licence fee It is not necessary that there should be actual correlation between the quantum of licence fee and the actual costs of services rendered It is also not necessary to do any separate or special service for the hawkers alone. As already submitted the Panchayat has to meet additional expenditure in keeping the road margins clean and for the regulation of the trade on the road margin"

Learned Counsel for the petitioner has referred me to the unreported decision of Rajagopala Ayyangar, J, in (*Venkatavaradan* v. *Executive Officer, Panchayat Board Kallakurichi and another* [1] The learned Judge in that judgment struck down levy of a fee by the Kallakurichi Panchayat, from persons who, without obstructing traffic on either side of the road or any portion thereof, sell or exhibits for sale an article or animal, according to the schedule specified. The learned Judge held that the difficulty in upholding the defence was that the fee had none of the incidents of a licence fee, and observed .

> "No licence is issued to the persons paying the fee, but they are merely granted a receipt for the sum paid. No conditions are stipulated as required to be carried out by the licensee, which would be the case if this were truly a licensing provision Further, when the petitioner alleged in his petition that the Panchayat Board were not incurring any extra expenditure, which they legally make good by levying the fee, there is no denial of this allegation It is clear law that a licence fee can be levied only to reimburse the public authority the extra expenses which the regulation of a trade, business or activity entails on it In the present case, is the local authority is incurring no extra expense on account of the use of the roads by the cars or carts, in which articles for sale are transported, or by the hawkers who carry their wares on their heads—which constitute 4 out of 5 categories dealt with in this resolution,—the levy of the fee cannot be legal In these circumstances the resolution of the Panchayat, dated 26th February, 1953 levying these licence fees in the name of taxes has to be quashed .."

To a similar purport is the decision of the Andhra High Court in *Commissioner, Municipal Council* v *Venkateswara Rao*[2], which also arose out of a writ petition filed under Article 226 of the Constitution and the levy there was under section 270 of the District Municipalities Act, which is similar to the provisions of the Madras Panchayat Act, namely, section 103 under which the present levy is made After observing that the levy in such a case cannot amount to a tax, but only a licence fee, the Bench of the Andhra High Court observed at page 622 :

> "In the present case, the petitioner and others vend articles on road margins There is nothing on record to show that the Municipality has incurred any extra expenditure other than that they had incurred for maintaining the roads as they

1 W P No 592 of 1953 2 (1956) An W.R 616.

should do under the Act. The roads would be laid and maintained from and out of the general funds. The only expenditure perhaps that may be attributable to the vending of articles, though it is not stated in the counter, is the proportionate supervisory charges incurred by the Municipality on its officers. There is no specific evidence as regards the approximate expenditure under this head The Municipality or the 2nd respondent who must be in a position to satisfy the Court did not attempt to place before it the nature of the services rendered and the income realised by the 2nd respondent."

In the present case also the Panchayat Board has not made any attempt to show the additional income which would be realised by the levy, and whether it could be correlated to any extra expenditure the Panchayat has to incur on account of the permission given to the hawkers on road margins The attempted explanation in the counter-affidavit by mentioning the services rendered by keeping the road margins clean, keeping the public road lit, etc , covers only the existing obligations which the Panchayat has to discharge irrespective of whether there are hawkers who sell articles on the road margins or not There is no reference at all to any extra expenditure for supervisory charges. My attention was drawn at the time of the hearing of this writ petition by the learned Counsel for the petitioner, to a Circular, No 1963, of the Inspector of Municipal Councils and Local Boards, dated 15th June, 1954, which clearly makes reference to the Judgment of this Court in *Venkatavaradan* v *The Executive Officer, Panchayat Board, Kallakurichi and another*[1], and directs the Executive Authorities of Panchayats that they should take steps to discontinue the levy of licence fees for the use of road by carts or other vehicles in which articles for sale are transported or by hawkers who carry their wares on their heads. The Panchayat Board, first respondent, in this case has contravened the above instructions, which are in terms of the unreported decision in *Venkatavaradan* v. *The Executive Officer, Panchayat Board, Kallakurichi and another*[1] That decision has made specific reference to hawkers who carry their ware on their heads or cart for cars in which articles for sale are transported It is clear that exhibiting articles for sale in the road margin would also fall within the scope of the said decision and the principles laid down in it The Andhra High Court decision has made pointed reference to articles exposed for sale on road margins and the need to conform to the ptinciples of levying licence fee in their cases. Learned Counsel for the first respondent, Panchayat Board, draws my attention to the decision to the Supreme Court in *Corporation of Calcutta* v *Liberty Cinema*[2] But that decision could be easily distinguished on the ground that though the levy in the case of a cinema house in that case was described as licence fee, the Supreme Court after a careful consideration of the circumstances, determined by a majority, that it was really a 'tax' and then discussed the principles under which such a levy of tax could be upheld But here there is no plea by the respondent that the levy is 'tax' On the other hand, it is admitted to be a licence fee Therefore, it should satisfy the requirements laid down in the unreported decision in *Venkatavaradan* v. *The Executive Officer, Panchayat Board, Kallakurichi and another*[1] and the Andhra High Court decision cited above. Obviously, those requirements are not satisfied in this case Therefore, the writ petition is allowed as prayed for No order as to costs

V.S. *Petition allowed*

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1 W P No 592 of 1953 1107
2 (1965) 2 S C.R 477 A.I R 1965 S.C

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. SRINIVASAN AND MR JUSTICE R. SADASIVAM

Murugayya Angurar and another . *Appellants**

v.

Nataraja Iyer and others . *Respondents*

Civil Procedure Code (V of 1908), *section* 100—*Concurrent findings about truth of surrender of tenancy—Interference in second appeal*

Madras Cultivating Tenants Protection Act (XXV of 1955) *and Transfer of Property Act (IV of* 1882), *section* 111 *(f)—Surrender—Tenant merely stating that he is unwilling to be tenant and asking landlord to take possession—No evidence of either landlord taking possession or tenant delivering possession—Surrender not valid*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 2 *(b)—Surrender of possession by one or more heirs of cultivating tenant— Whether binds others not party to such surrender—Tenant dispossessed by landlord—Remedy is under the Act*

Having regard to the provisions of the Cultivating Tenants Protection Act it is difficult to believe that the first plaintiff as a tenant would have voluntarily surrendered his leasehold interest, particularly when the extent of the lands comprised in the lease is large But, the concurrent findings of the Courts below about the truth of the surrender cannot be interfered with in second appeal as the same relate to a question of fact, though, it is opposed to the weight of evidence and probabilities of the case So long as the Courts below had some material, however inadequate to establish the above finding, it is not for this Court to interfere with the same in second appeal

It is clear from the evidence in this case that according to the first defendant the first plaintiff met him at Thanjavur and merely stated that he was not willing to be a tenant and asked the first defendant to take possession of his lands and that the first defendant accepted it But the first defendant did not state that he went with the first plaintiff to the village where the suit lands are situate or that the first plaintiff delivered possession of the lands.

Held, surrender is not valid

'Cultivating tenant' as defined in the Cultivating Tenants Protection Act includes the heirs of a cultivating tenant It could not be said that if one or more heirs find it inconvenient to cultivate the land and seek avocation elsewhere, the tenancy would come to an end even as regards the other cultivating tenants in actual possession of the land *Held* the alleged surrender of the lease by the first plaintiff cannot obviously bind the second plaintiff The second plaintiff is not a party to the surrender and it cannot bind him

If the plaintiffs had been dispossessed by the defendants, even wrongfully, their remedy is under the Cultivating Tenants Protection Act to seek restoration of possession

Appeal against the Decree of the District Court of West Thanjavur at Thanjavur in Appeal Suit No 109 of 1960, preferred against the Decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No 33 of 1959

G Ramaswami and *S Sundaram*, for Appellants.

R Gopalaswami Iyengar, for 1st Respondent

The Judgment of the Court was delivered by

Sadasivam, J—The appellants in the Second Appeal filed the suit for injunction on the ground that they are cultivating tenants of the first defendant-respondent, under Madras Act XXV of 1955 as amended by Act XIV of 1956, and as such they are entitled to remain in possession of the suit properties The plea of the first

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* S A No 840 of 1963 19th April, 1968.

defendant is that the plaintiff committed default in payment of rent for fasli 1366 and did not have the means to pay the same when a demand was made by him for arrears of rent and so the first plaintiff surrendered possession of the leasehold lands on 20th April, 1957 Though the suit lands included S No 189/2 and S No 201/1, the plea of the first defendant is that they do not belong to him and this plea has been accepted by the Courts below and there is no dispute about it The Courts below have referred to the remaining lands alone as the suit lands Ever since the alleged surrender, the first defendant claims to have been cultivating the suit lands as pannai lands with the help of the second defendant in whose favour he has executed a power of attorney. Defendants 2 and 3 supported the claim of the first defendant and denied having interfered with the possession of the suit lands claimed by the plaintiffs The trial Court accepted the truth of the surrender put forward by the first defendant. But, on appeal, the learned District Judge reversed the finding of the trial Court This Court, in Second Appeal No 985 of 1960, remanded the appeal as it was not satisfied with the finding of the lower appellate Court negativing the truth of the oral surrender. The subsequent District Judge who tried the appeal accepted the truth of the surrender and hence the plaintiffs have preferred this Second Appeal.

Sri G Ramaswami, learned Advocate for the appellants, relied on several facts to show that the surrender pleaded by the first defendant could not be true. If we were dealing with this matter as a trial Court, or as the first appellate Court, we would have great hesitation in accepting the truth of the surrender The burden of proof is on the first defendant to prove the truth of the surrender. Having regard to the provisions of the Cultivating Tenants Protection Act, it is difficult to believe that the first plaintiff as a tenant would have voluntarily surrendered his leasehold interest, particularly when the extent of the lands comprised in the lease is 32 acres 93 cents. The first defendant came forward with a plea that the plaintiffs owed arrears of rent to the extent of Rs. 5,000 He filed O S. No 128 of 1957, in the District Munsif's Court, Tiruvaiyaru, to recover the said arrears of rent, but it was decreed only for a sum of Rs. 2,405 According to the first defendant, he went from Madras to Thanjavur and met the first plaintiff there on 20th April, 1957 and asked him to pay the arrears of rent of Rs 5,000 within one week, that the first plaintiff asked for remission, that he refused to give any remission and that thereupon the first plaintiff stated that he was not willing to be a tenant. This is the surrender put forward by the first defendant In O S No 128 of 1957 on the file of the District Munsif's Court, Thiruvaiyaru, to recover arrears of rent, the present first defendant gave evidence that he met the first plaintiff herein only on 19th April, 1957 But in his evidence in this suit he would state that by mistake he gave the date as 19th April, 1957 in the rent suit The finding of the learned District Judge is that the date of surrender, 20th April, 1957, mentioned in the notice Exhibit A-6 must be correct as it was made when the fact was fresh in the memory of the first defendant The first defendant is an Advocate. The reasons given by the learned District Judge in paragraph 8 of his judgment are hardly convincing Thus there is no meaning in the learned District Judge saying that if really the first defendant had met the plaintiff on 19th April, 1957 and had not met him subsequently and was in fact at Madras on 20th April, 1957, as suggested in the cross-examination of the first defendant, it is unlikely that the first defendant would have stated in Exhibit A-6 that the surrender took place on 20th April, 1967. Exhibit A-4 is a notice dated 22nd April, 1957 calling upon the first plaintiff to surrender possession of the thope in R S. No. 92/7 measuring 2 acres 41 cents and another punja land in R S No 33/2-A measuring 73 cents covered by the lease in favour of the plaintiffs to one Shanmugham on the ground that the properties were sold to him If really the surrender pleaded by the first defendant is true, there was no necessity to send such a notice on 22nd April, 1957 as the surrender is alleged to have taken place even two days earlier. The concurrent findings of the Courts below about the truth of the surrender cannot be interfered with in second appeal as the same relate to a question of fact, though to our minds, it is opposed to the weight of evidence and

probabilities of the case. So long as the Courts below had some material, however inadequate to establish the above finding, it is not for this Court to interfere with the same in Second Appeal.

Even assuming the truth of the surrender pleaded by the first defendant, it is not valid for more than one reason In Woodfall on Landlord and Tenant, 26th Edition, Volume I, page 918, section 2004, it is stated that a surrender could be by unequivocal giving and acceptance of possession. It is stated that an agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law In Mulla's Transfer of Property Act, Fifth Edition, at page 735, it is stated that a surrender may be oral if accompanied with the delivery of possession *Narasimma* v. *Lakshmana*[1], *Warishkan* v *Daulat Khan*[2], *and Pusaram* v *Deorad*[3], are given as authorities for the view. The above decisions do not specifically lay down the above principles, though it could be inferred from them Thus in *Waris Khan* v. *Daulat Khan*[2], it is stated that a tenant who wishes to relinquish a holding and to be no longer liable for the rent of the same can do so by a notice in writing only, and by relinquishing possession of the whole of the land under his lease. It is pointed out in the decision that section 31 of the North-Western Province Rent Act, does not say that such a tenant cannot relinquish a portion of his land in any other way, but that he does so at his peril and may continue liable for the rent, as the zamindar may refuse to take over a portion only of the holding ; but where the zamindar takes over a portion of the holding and re-lets or occupies it, the tenant is no longer liable for the rent of the portion so let or occupied. It is clear from the evidence in this case that according to the first defendant the first plaintiff met him at Thanjavur and merely stated that he was not willing to be a tenant and asked the first defendant to take possession of his lands and that the first defendant accepted it. But the first defendant did not state that he went with the first plaintiff to the village where the suit lands are situate or that the first plaintiff delivered possession of the lands. In fact the first defendant returned to Madras on the same day, there was a dispute about the possession of the lands and there was an enquiry by the Police in that connection.

The plaintiffs are cultivating tenants under the first defendant and the alleged surrender is by the first plaintiff alone. In *Leek and Moorlands Buildings Soc* v. *Clark*[4] it has been held that in the absence of express authority it was not competent for one of two joint tenants to surrender rights held jointly, and, therefore, the sale by the husband of the premises to *C*, without the wife's authority did not terminate the joint tenancy, and, as against the husband and wife, the plaintiffs were not entitled to possession. Sri K.N. Balasubramaniam, the learned Advocate for the respondents, relied on the decision in *Doe D. Aslin* v. *Summersett*[5], cited at page 495 of the above decision, as supporting his contention that a joint tenancy could be put an end to by a notice to quit served and signed by only one of the joint lessors This case can be clearly distinguished and in fact it has been distinguished in the above decision. The ratio of the decision appears from the following sentence at page 140 :

> "Upon a joint demise by joint tenants (*i e.*, the lessors in that case) upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please ; and as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to that tenancy...."

The case related to a notice to quit in respect of a periodic tenancy. A periodic tenancy continues from period to period unless the notice agreed to or implied by law is given But if one of two joint lessees who hold the whole wished it not to

1. (1890) 13 I L R Mad 124 at 127
2 I L R. (1903) 25 All 77
3 (1947) A M. 188 (correct reference is A.I R. 1947 Nag. 188)
4. (1952) 2 All E R 492.
5. (1803) 1 B. & Ad 135.

continue beyond the end of a period, it might well be held that it did not continue into a new period That would happen only if all, that is, the joint lessees, should so please If one considers a lease to joint lessees for a term certain with a right of renewal, it would be obvious that both must joint in requiring a renewal. In *Bejoy Chand* v *Kali Prasanna*[1], a Bench of the Calcutta High Court has held that it is necessary in order to bind even a joint tenant that the notice must be addressed to and served on him in one of the ways mentioned in section 106 of the Transfer of Property Act and that the service of notice on one of the joint tenants would not bind the other joint tenants on whom notice was not served 'Cultivating tenant' as defined in the Cultivating Tenants Protection Act includes the heirs of a cultivating tenant It could not be said that if one or more heirs find it inconvenient to cultivate the land and seek avocation elsewhere, the tenancy would come to an end even as regards the other cultivating tenants in actual possession of the land Thus, the alleged surrender of the lease by the first plaintiff cannot obviously bind the second plaintiff The learned District Judge has observed that the second plaintiff has not sent a notice to the first defendant impeaching the validity of the surrender by the first plaintiff Obviously this reasoning is unsound The second plaintiff is not a party to the surrender and it cannot bind him.

The main and important question for consideration in this suit is whether the plaintiffs were in possession of the suit lands on the date of suit to entitle them to obtain a decree for injunction If the plaintiffs had been dispossessed by the defendants, even wrongfully, their remedy is under the Cultivating Tenants Protection Act to seek restoration of possession The learned Subordinate Judge has framed an issue as to whether the plaintiffs were in possession of the suit properties on the date of suit and found against the plaintiffs The learned District Judge who originally tried the appeal, allowed the appeal. But the learned District Judge who heard the appeal after remand, has not even framed a point for determination about the most important question, whether the plaintiffs were in possession of the suit properties on the date of suit It is true that in course of the judgment, he has given a finding that there is ample evidence to prove that after 20th April, 1957 the first defendant was in possession of the suit lands through the second defendant. But this finding cannot be sustained in the absence of a specific point for determination about it In the absence of a specific point for determination about it the learned District Judge could not have bestowed his thought on the relevant question and considered the case in all its aspects Further, the truth and validity of the surrender are also relevant circumstances in deciding that question

Having regard to these facts, we are constrained to remand the second appeal, though reluctantly in view of the fact that the litigation was started as early as in 1959. The decree and judgment of the learned District Judge are, therefore, set aside and the appeal is remanded to the District Judge for fresh disposal according to law The learned District Judge shall frame a specific point for determination as to whether the plaintiffs were in possession of the suit lands on the date of suit and give a finding on that point and on the other points for determination already framed by him and dispose of the appeal on its merits without being embarrassed by observations of the Court in this judgment or the prior judgment of remand on questions of fact arising in the appeal. The costs of the parties shall be provided for in the revised judgment to be passed by the learned District Judge after remand. The Court-fee paid by the appellants shall be refunded to them

S V.J. *Order accordingly.*

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1. A.I.R. 1925 Cal. 752.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

T. M. Abdul Gani, representing the estate of T M. S. Mohamed Abdul Khader, Koothanallur . *Petitioner**

v.

The Agricultural Income-tax Officer, Tiruthuraipundi . *Respondent*

Madras Agricultural Income-tax Act (V of 1955), section 65—Compounding of tax—Composition allowed for a year—Death of assessee in the year—Devolution of property on the heirs—Compounding in the case of heirs—If allowable for broken periods—Compounding on the basis of entire estate of deceased—Not in accordance with law

For the year 1963-64 the assessee had been allowed to compound agricultural income-tax payable on his entire estate The assessee died on 18th February, 1964. During his life time he had made certain gifts and after his death his heirs on whom his assets devolved in defined shares, applied as tenants-in-common for composition of tax The Officer informed them that since the assessee had died at the fag end of the accounting year, his entire lands should have to be assessed in the hands of his legal representatives taken jointly and he proceeded to say that it is proposed to levy composition fees for all the lands in the name of the deceased assessee as it was done in the previous year 1963-64 In a petition under Article 226 of the Constitution.

Held, the provisions of the Act do not contemplate compounding for broken periods Where a holder of land who derives agricultural income dies in the middle of an accounting year and the estate devolves not by transfer but by succession on more heirs of his than one, the provisions relating to compounding do not cover such cases. The basis of compounding is the extent of the holding and the fixed rate applicable thereto and there is no provision for splitting of either the extent of land or the rate applicable thereto.

The view of the Officer that he could call upon the applicants to consent for compounding on the basis of the entire estate of the deceased, is not in accordance with law. He can bring to charge the agricultural income of the deceased before his death, and separately the agricultural income derived by his heirs after his death.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Agricultural Income-tax Officer, Tiruthuraipundi, to accept the composition application dated 25th May, 1964 in his file No G I R 41 M 64 -65 and levy the composition fee in accordance with the application submitted by the petitioner.

K R Ramamani, Subbaraya Ayyar and *Sethuraman* and *Padmanabhan*, for Petitioner.

The Assistant Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—The petitioner seeks, under Article 226 of the Constitution, a direction to the Agricultural Income-tax Officer, Tiruthuraipundi, to accept the composition application dated 25th May, 1964 and levy the composition fees on its basis T M S. Mohamed Abdul Khadar died on 18th February, 1964 For the year 1963-64, he was allowed to compund agricultural Income-tax payable on his entire estate. During his life-time, he had made certain gifts and after his death his heirs on whom his assets devolved in defined shares under their personal law, applied as tenants in common for composition of the tax The Agricultural Income-tax Officer, by his communication dated 26th May, 1965, informed the petitioner

* W.P. No. 2508 of 1965. 15th October, 1968.

that since Mohamed Abdul Khader had died at the fag end of the accounting year 1963-64, his entire lands should have to be assessed in the hands of his legal representatives taken jointly." He proceeded to say :

" It is proposed to levy composition fees for all the lands in the name of T. M. Abdul Ghani as it was done in the previous year 1963-64 "

The Officer, therefore, requested the applicants, for consent to proceed accordingly. It is in this background, the direction in the writ petition is sought.

An examination of the compounding provisions in the Madras Agricultural Income-tax Act, 1955, as amended in 1958, leads us to the conclusion that they do not contemplate compounding for broken periods. The charge to agricultural Income-tax for any year is levied in respect of the agricultural income of the previous year. But the compounding fee is computed not on the basis of such income but of the extent of the holding. The compounding fee is fixed at so much for so much holding on a progressive scale. Where a holder of land who derives agricultural income dies in the middle of an accounting year and the estate devolves not by transfer but by succession on more heirs of his than one, the provisions relating to compounding of tax do not cover such cases It is possible to split the income in such a case and bring to charge the fractional income referable to the charge before and after the death of the holder of the land who derives agricultural income applying the rate appropriate to the income so ascertained. But that process is not possible in compounding tax , for, the basis is the extent of holding and the fixed rate applicable thereto and there is no provision for splitting of either the extent of land or the rate applicable thereto

We are of the view, therefore, that the application made on the basis of tenants in common itself cannot be granted for a broken period. Likewise, it would follow that composition cannot be permitted as the provisions of the Act stand at the moment, even in respect of the period anterior to the death of Mohamed Abdul Khader On that view, it would be clear that the view of the Agricultural Income-tax Officer, that he could call upon the applicants to consent for compounding on the basis of the entire estate of the deceased, is not in accordance with law. All that he could possibly do, as it appears to us, is to bring to charge the agricultural income of the deceased before his death, and separately the agricultural income derived by his heirs after his death.

On that view the petition is dismissed but without costs.

V S. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

P. Chelladurai .. *Appellant.**

Penal Code (XLV of 1860), *section* 161—*Amount received for past services rendered by public servant—If comes within the mischief of the section.*

The contention that any amount received as reward for the past service rendered by a public servant would not come within the mischief of section 161 of the Penal Code, is untenable The word " reward " in the section clearly denotes a payment for a past service. If the contention is accepted it will lead to an absurd position, namely, whenever a public servant stipulates to receive money for doing service, after the service is rendered it will not be an offence under the section. This can never be the intention of the Legislature.

Appeal against the Judgment of the Special Judge and District Magistrate, Thanjavur at Kumbakonam in Special Case No. 2 of the Calendar for 1966 dated 17th November, 1968.

*Cr. A. No. 976 of 1966. 14th October, 1968.

G. Gopalaswami and *S. G Subramaniam*, for Appellant.

The Assistant Public Prosecutor, for State.

The Court delivered the following

JUDGMENT :—The appellant Chelladurai was convicted under section 161, Indian Penal Code, and section 5 (2) read with section 5 (1) (*d*) of the Prevention of Corruption Act, by the Special Judge and District Magistrate, Thanjavur at Kumbakonam, in Special Case No. 2 of 1966 and sentenced to R I for one year under the latter section. No separate sentence was awarded under section 161, Indian Penal Code.

The appellant was charged for having received a sum of Rs. 30 from P. W. 1 Panchmurthi as a motive or reward for doing a favour to him in the exercise of his official functions, namely, for making arrangements to accept the re-tender submitted by P.W. 1, by the office of the District Medical Officer, Thanjavur at Nagapattinam.

The prosecution case is briefly this · The appellant, during the relevant period was a Lover Division Clerk attached to the Government Hospital, Mannargudi. One of his duties was to attend to the tenders submitted by the contractors for supply of materials to the Government Hospital. P W. 1, Panchamurthy, who is a resident of Mannargudi submitted a tender for the supply of certain diet articles to the Government Hospital for the year 1966-67 in the name of his father as his father on previous occuasions was supplying diet articls to the Hospital He got a communication at the end of March, 1966 from the Medical Officer, Government Hospital, Mannargudi, to the effect that his tender had been rejected Then he submitted a re-tender in his own name on 8th April, 1966 One week later, the appellant went to the house of P.W. 1 and asked him if he knew as to why the tender submitted by him on the prior occasion was rejected On P.W. 1 telling him that he did not know the reason, the appellant was alleged to have told P W. 1 that he ought to have contacted him and paid money to him and that if he had done this earlier, he would have put up a favourable note recommending the acceptance of his tender. The appellant further told P W. 1 that if his tender dated 8th April, 1966 were to be accepted, he should put up a note recommending his tender to the Medical Officer, Mannargudi and that the Medical Officer Mannargudi should recommend the same to the District Medical Officer, Nagapattinam. The appellant demanded a sum of Rs 50 from him for putting up a note recommending his tender P W. 1 told him that he would consider the matter. The appellant again contacted him on 21st April, 1966 and told him that he had forwarded the tender after getting the signature of the Medical Officer, Government Hospital, Mannargudi, in the hope that he would pay him the bribe demanded by him. The appellant also told P.W. 1 that if he did not pay the amount, he would meet the Head Clerk in the office of the District Medical Officer, Nagapattinam, and see that his tender was rejected So saying, the appellant asked him to pay Rs. 30 for his share on the next day while he returned from the office to his house in the evening or on the morning of the next day and that a sum of Rs. 20 also should be paid as the share of the Head Clerk of the Office of the District Medical Officer, Nagapattinam, saying that the said sum could be paid later P.W. 1 agreed to pay Rs 30 the next day while the appellant, returned from the Hospital to his house in the evening as suggested by the appellant as he was afraid that the appellant would do harm to him. However, he thought over the matter and decided to report to the Vigilance Police in charge of Anti-Corruption On the morning of 22nd April, 1966, P.W. 1 contacted P.W. 5 Sri V. N. Srinivasa Rao, Inspector attached to the Vigilance and Anti-corruption Department at Thanjavur and told him about the demand made by the appellant. P.W. 5 recorded a complaint from P.W. 1, P W 5 instructed P.W. 1 to meet him in the Travellers' Bungalow with Rs 30 intended to be paid to the appellant. At 3 P.M. on the same day, P.W. 1 produced Rs 30 in three currency notes of denomination of Rs. 10 each before P W. 5, in the presence of P.W. 2, Subbiah, Tahsildar, Mannargudi and the Deputy Commercial Tax Officer, Mannargudi The numbers of the currency notes were noted by P W. 5 in a mahazar, attested by P W. 2 and

the Deputy Commercial Tax Officer. P W. 1 was instructed by P W 5 to proceed to the Government Hospital, Mannargudi and pay the amount to the appellant, if demanded by him, and if he had accepted the amount to signal to P W 5 by pretending to apply snuff to his nose and picking up the kerchief from his pocket and waving it as though it was for rubbing his nose P W. 1 accordingly proceeded to the hospital by cycle P Ws 2 and 5 followed him in a jeep and stood at a distance of 20 yards from the gate of the Government Hospital At about 5 or 5-15 P M, the appellant came from the Hospital Office and asked him if he had brought the money as promised by him. When P W. 1 told him that he had brought the money, the appellant took him towards the hotel on the eastern side of the Hospital After P.W 1 and the appellant had proceeded ten yards from the Hospital gate, the appellant asked for the money P.W 1 gave M.Os 1 to 3, three ten rupees notes to the appellant. The appellant received them and kept them in the left pocket of his shirt. Thereafter P.W 1 signalled to P.W 5 who was standing at a distance of 20 yards. Immediately, P W. 5 along with P.W. 2 rushed to the appellant and asked him to produce the amount received by him from P.W. 1. The appellant produced the notes from his pocket. On comparison, the notes recovered from the appellant were found to be the same notes, the numbers of which were noted in a mahazar.

When questioned under section 342, Criminal Procedure Code, the appellant admitted having received money from P W. 1, but stated that P.W. 1 requested him to go to the office of the District Medical Officer and find out the details from them in respect of the tender submitted by him as P.W. 1 did not know any one in the office and that on his saying that it will not be possible for him to avail leave for that purpose and go to the office at Nagapattinam, P W. 1, had told him that he could go in a taxi and paid Rs. 30. He further stated that he was trapped at the instance of one Balakrishnan who was working as a Clerk in the Government Hospital, Mannargudi, and who was inimically disposed towards him as he (the appellant) exposed his intimacy with one nurse in the hospital kitchen, to the Medical Officer, Mannargudi.

The case is very simple. The appellant admitted that he received Rs. 30 from P.W. 1. The case of P.W. 1 is that the appellant insisted upon him to pay Rs. 30 not only for having put up a favourable note recommending his tender but also for making further arrangements with the Head Office at Nagapattinam for accepting his tender. There is no reason to reject the evidence of P.W 1. The appellant does not dispute the fact that he had put up a favourable note recommending his tender to the Head Office and obtained the signature of the Medical Officer, Mannargudi. His explanation itself probabilises the version of P.W. 1 that the appellant would arrange with the Head Office at Nagapattinam for accepting the tender. It is very difficult to believe the case of the appellant that P.W. 1 gave Rs. 30 as taxi charges to go to Nagapattinam to find out the details from the Head Office The appellant is a public servant P W. 1 does not seem to be his friend In these circumstances, it is curious that the appellant would have accepted to go to Nagapattinam merely to oblige him without receiving a gratification for the favourable arrangements to be made for accepting the tender of P.W. 1 by the Head Office No motive has been suggested to P.W. 1 as to why he should be a party in laying a trap when especially according to the appellant, he was prepared to oblige him. I accept the case of the prosecution that the appellant received Rs 30 as illegal gratification for having put up a favourable note recommending the tender of P.W. 1 and also for making arrangements at the Head Office for accepting his tender.

The learned Counsel Sri C. Gopalaswami argued that any amount received as reward for the past service rendered by a public servant would not come within the mischief of section 161, Indian Penal Code. He stressed this point on the language used in section 161, Indian Penal Code, which according to him refers to things to be done by a public servant or forbearing to do by such public servant in future. I am unable to agree with him The relevant words in section 161, Indian Penal Code, are as follows.—

" . as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions . "

From these words, it is argued by the learned Counsel that what is referred to is only for doing or forbearing to do any official act in future The word " reward ', according to Shorter Oxford Dictionary, means " a return or recompense made to, or received by, a person for some service or merit, or for hardship endured " It clearly denotes a payment for a past service If the contention of the learned Counsel is accepted, it will lead to an absurd position, namely, whenever a public servant stipulates to receive money for doing service, after service is rendered it will not be an offence under section 161, Indian Penal Code This can never be the intention of the Legislature Yahya Ali, J, in *Venkatasubbiah* v *Emperor*[1], on a similar contention raised, held that the term " reward " in section 161, Indian Penal Code, was manifestly intended to apply to a past service and that any other construction would lead to an absurdity. I respectfully agree with this decision. I do not, therefore, see any force in the contention of the learned Counsel The convictions of the appellant under section 161, Indian Penal Code, and section 5 (2) read with section 5 (1) (*d*) of the Prevention of Corruption Act are confirmed.

So far, as the sentence is concerned, I am inclined to take a lenient view The appellant is a middle-aged man who was getting a very meagre salary as a Clerk at the time he committed the offence He has lost his job He has been in jail for a week Taking all these circumstances into consideration, I do not think it necessary to send him back to jail and, therefore, I reduce his sentence of imprisonment to the period already undergone

The appeal is dismissed with the modification in the sentence.

V.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K SRINIVASAN AND MR. JUSTICE R. SADASIVAM

Chinnapaiyan *alias* Arumugham *Petitioner.**

Penal Code (*XLV of* 1860), *sections* 299, 300, Thirdly *and* Exception 1 *to section* 300—*Scope and applicability*

There is nothing to support to plea of the appellant that the deceased child spat on him or showed its legs Even assuming it to be true, it is difficult to see how such act of the child of 5 years would constitute a provocation and much less grave provocation, to sustain the plea of grave and sudden provocation under *Exception* 1 to section 300, Penal Code.

On the facts of this case, however, it could not be said that the appellant intended to cause the death of the child It is not possible to bring the case under clause (3) of section 300 but only under the second clause of section 299 There can be no doubt that the appellant did intend to cause injuries to th child but it could not be said that the injuries were sufficient in the ordinary course of nature to cause death It is clear from the medical evidence that the child died of shock The appellant, when he caught hold of the child and hit it against the stone twice, should have known that death was likely to be caused. The appellant could safely be convicted only under the second clause of section 299 of the Penal Code.

Trial referred by the Additional Sessions Judge of the Court of Session of the Salem Division at Salem for confirmation of the sentence of death passed upon the said prisoner in Case No 4 of the Calendar for 1968 on 21st June, 1968, and Appeal by the said prisoner (accused) against the said sentence of death and the sentence of rigorous imprisonment for a period of six months passed under section 379 Indian Penal Code, and directed to merge with the sentence of death, passed upons him in the said case

1 (1947) 2 M L J 160

* Referred Trial No. 36 of 1968
Crl.A No 488 of 1968 28th October, 1968.

C. Harikrishnan for Appellant.

The Public Prosecutor, for State.

The Judgment of the Court was delivered by

Sadasivam, J.—Appellant Chinnapaiyan *alias* Arumugham has been convicted under sections 379 and 302, Indian Penal Code, for having committed theft of a silver waist-cord from the possession of the female child Rajeswari *alias* Nageswari, aged about 5 years, and caused the death of the said child in the course of the same transaction, by dashing her against a big stone at about 9 A.M., on 3rd October, 1967 at Jagir Ammapalayam village, and sentnced to R.I. for six months on the first charge and to death, subject to confirmation by this Court, on the second charge. The sentence of imprisonment was ordered to merge with the capital sentence The appellant is the brothers' son of P.W. 1, Ayithal The deceased child Rajeswari was the daughter of P W. 8, Ganesan, the son of P.W. 1. On the morning of 3rd October, 1967, the appellant approached his aunt, P.W. 1, and asked her for a rupee saying that he was feeling giddy as he had not taken food P W 1 told him that she had no money and offered to give him food. But the appellant did not want food and went and sat near the well at a distance of 30 or 40 marks. P.W. 3, Thangaraju, aged 12 years, P W 4 Selvaraju, aged 13 years, and other boys were playing near the well. The deceased child Rajeswari was standing nearby The appellant caught hold of the child, and snatched the silver waist-cord worn by it and when the child cried he dashed it on the stone nearby. P W. 1, her daughter P.W. 2, Govidammal, the boys P Ws 3 and 4, P W 5, Karuppa Chetti, living at a distance of 50 feet from the well and P W. 6 Arunachalam, who was then going along the road, claim to have witnessed the occurrence. In spite of their crying aloud, the appellant dashed the child against the stone a second time and left the place Just after he passed P.W 6, the latter took a cycle, which was being pushed along the road by one Manickam, and proceeded on it, with Manickam on the carrier, to catch hold of the appellant The cycle driven by P.W. 6 dashed against the appellant and this resulted in the appellant, P.W. 6, and Manickam falling on the ground. The appellant sustained minor injuries, but he escaped He went to the Police Station, shortly after P.W 1 gave the complaint Exhibit P-1 The appellant was arrested with his blood-stained dhoty. The appellant is alleged to have made a statement about the silver waist-cord, but no recovery was made in pursuance of the same. P W 2, Govindammal, took the child to the Mill Hospital, but the Doctor there found that the child was dead It was only thereafter P.W. 1 gave the complaint Exhibit P-1, in this case

P.W 14, Dr Vijayal, conducted post-mortem on the body of the child Rajeswari and she found a laceration on the right side of the chin, and abrasion on the right side of the chest, a group of abrasions above the right chest, an abrasion on the right chest below the axilla, an abrasion just above that injury and a minute abrasion on the left knee-cap. The doctor reserved her opinion as to the cause of death and sent the viscera for chemical analysis and she gave her final opinion that the deceased child would appear to have died due to shock on account of the injuries to the abdominal wall and chest

The appellant was produced before the Sub-Magistrate, P W. 13, Thaiyanayagam, for his judicial confession being recorded P W 13 gave the necessary warnings and time for reflection and after satisfying himself that the appellant wanted to make a voluntary statement, recorded the statement Exhibit P-13. In this judicial confessions the appellnt has stated that on the date of occurence, he went to beat his aunt's son, P W 8, Ganesan, as he was unable to bear the troubles given by him, that P W 8 was not in his house, that the child Rajeswari, daughter of P.W. 8, spat on him and showed her left leg against him, that he lifted the child catching hold of its legs and dashed it out of anger and that immediately after dashing the child he went straight to the Police Station.

During his examination under section 342 of the Code of Criminal Procedure, in the committal Court, the appellant pleaded inability to recollect whether he made

a judicial confession He stated that he did not know anything about the occurrence and that he saw the child lying dead on the rock and he ran away. During his examination under section 342 of the Code of Criminal Procedure in the Sessions Court, the appellant gave the following version.

> "There was enmity between me and P.W 8 (Ganesan) He owed me Rs. 200. I went to his house to get back the amount He was not present. I quarrelled with his wife Kandayee The deceased child came out and spat on me and also showed her legs I pushed it down. There were stones there. It fell down on that. I was going away I heard people saying that the child had died. So I went straight to the Police Station"

Thus, the appellant does not dispute the fact that he took the child and hit it against the stone. There is also no reason to disbelieve the evidence of the eye witnesses, P Ws 1 to 6, about the act of the appellant in catching hold of the child and hitting it twice against the stone During his examination in the Sessions Court the appellant has stated that he went to the house of P.W. 8 to demand repayment of the loan of Rs 200. But the only suggestion made to P.W. 1 is that the appellant returned from Tirupathi, four days prior to the occurrence, with Rs 200. There was no suggestion to her that he gave the said amount to P W. 8 In fact, no suggestion was made to P.W 8 that he took any loan from the appellant. Even in his judicial confession, Exhibit P-13, the appellant has not mentioned that he gave any loan to P.W. 8 He has only stated therein that P.W. 8 gave him trouble for a long time and that unable to bear the same he went to beat him P W. 1 has stated that the appellant came and asked her for a loan of a rupee and that she offered to give him food. It is clear from the evidence of P.Ws. 1 and 8 that the appellant was leading a wayward life and that P W. 8 has even chastised him on one occasion.

The plea of the appellant that the deceased child had spat on him and raised its legs does no doubt find support in the judicial confession, Exhibit P-13. But there is nothing in the evidence of P.Ws. 1 to 6 to support this statement The learned Sessions Judge has rightly pointed out that in the earliest report, Exhibit P-1 given by P W. 1 she has given the same version which she has given at the trial There is nothing in Exhilit P-1 to support the plea of the appellant that the deceased child spat on him or showed its legs. Even assuming the said statement in Exhibit P-13 to be true, we fail to see how the act of the young child of 5 years would constitute a provocation and much less grave provocation, to sustain the plea of grave and sudden provocation under *Exception* (1) to section 300, Indian Penal Code.

We entertain grave doubts whether the appellant committed theft of the silver waist-cord worth a few rupees, from the child It is unlikely he would have attempted to commit theft of that waist-cord in the presence of so many witnesses It is true P Ws. 1 to 5, among the eye-witnesses, speak to the appellant having snatched away the waist-cord Evidently, the act of the appellant in taking hold of the child and the subsequent missing of the waist-cord must have induced a belief in these witnesses that the appellant took away the waist-cord It should be noted that the appellant immediately went to the Police Station with his blood-stained dhoti and surrendered there No waist-cord was recovered in pursuance of any statement made by the appellant The guilt of the appellant under section 379, Indian Penal Code, is therefore doubtful and the appellant is entitled to the benefit of the doubt.

On the facts of this case, it could not be said that the appellant intended to cause the death of his aunt's grand-daughter. It is however clear from what we have stated that the appellant did catch hold of the child and hit it twice on the stone near the well. The evidence of P W 14, Dr. Vijayal shows that the external injuries sustained by the child were minor abrasions and lacerations and the injuries were all simple and could not, by themselves, account for the death of the child. The Doctor also stated that if a child was dashed on a rock or stone forcibly by some one holding its legs, some more injuries could have been caused and the head might have been broken and that it all depended upon the force used Having regard to the nature of the injuries found on the child, it is obvious that much force could not have been used by the appellant We have already referred to the evidence of the Doctor

that she had reserved her opinion about the cause of death and sent the viscera for chemical analysis She, however gave her opinion finally that the child would have died of shock due to the injuries to the abdominal wall and chest It is clear from her evidence and the post-mortem certificate, that the chambers of the heart were empty, and this gives a clue as to how the shock caused the death of the child. In Glaister's Medical Jurisprudence and Toxicology, Eleventh Edition, page 127, it is stated as follows :

> " Primary shock, a frequent cause of syncope, results from different impulses which cause reflex vasodilatation and a resultant serious fall in the blood-pressure due to the actual diminution of the volume of the blood passing through the heart to the arteries. The capillaries of the skeletal muscles are chiefly affected, and in these the blood collects instead of returning to the heart, causing a temporary deprivation of the blood from the circulation and cerebral anaemia "

In Modi's Medical Jurisprudence and Toxicology, Sixteenth Edition, page 249, it is stated that death may occur from shock without any visible injury from paralysis of the heart by a blow on the cardiac region, or from the inhibitory action of the solar plexus caused by a blow on the pit of the stomach in the upper part of the abdomen.

Having regard to the above facts it is not possible to bring the present case under clause (3) of section 300, Indian Penal Code, but only under the second clause of section 299, Indian Penal Code There can be no doubt that the appellant did intend to cause injuries to the child but it could not be said that the injuries were sufficient in the ordinary course of nature to cause death. It is clear from the medical evidence in this case that the child died of shock The appellant, when he caught hold of the child and hit it against the stone twice, should have known that death was likely to be caused The appellant could safely be convicted only under the second clause of section 299, Indian Penal Code The conviction of the appellant under section 302, Indian Penal Code, is therefore altered to one under section 304 (Part I), Indian Penal Code The sentence of death is set aside and instead we impose on him a sentence of rigorous imprisonment for seven years The conviction of the appellant under section 379, Indian Penal Code, and the sentence of rigorous imprisonment for six months imposed in respect of the same are set aside.

V.K. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

The Union of India owning the Southern Railway, represented by the General Manager, Park Town, Madras .. *Appellant**

v

The Seyadu Beedi Company, Tirunelveli Junction, by its Managing Partner, T U S Balgurubbani, and another .. *Respondents.*

Limitation Act (IX of 1908), Article 30—Suit against carrier for compensation for losing or injuring goods—Starting point, limitation—Statement that plaintiff's claim is under investigation and that he will be advised on finalisation of claim—Whether amounts to implied admission of liability

Practice—Costs—Appellant succeeding only on ground of limitation—Parties directed to bear their respective costs

Article 30 mentions that the time begins to run from the date when the loss or injury occurs The actual loss or injury to the goods may occur on one date and the carrier may come to know of it only on a later date and the interval between the two dates may be more than one year It would not be reasonable to construe the time from which the limitation commences to run under Article 30 of the Limitation Act of 1908 as the actual date of the loss or injury, and it is on account of this fact, the Courts rely on the date on which the carrier of the goods after coming to know of the loss or injury to the goods conveys the information to the consignor as the starting point for limitation

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*Appeal Nos. 38 (Tr) 401 of 1962. 12th November, 1968.

According to column (3) of Article 30 of the Limitation Act, the starting point of limitation would be the date of the loss or injury to the goods, though after the goods were consigned by the consignor he would not be in a position to know the precise date on which the loss or injury has occurred and that the burden would be on the railway administration who want to non-suit the plaintiff on the ground of limitation to establish that the loss or injury occurred more than one year before the institution of the suit The period of limitation could not be put to a later date when the extent of the injury is ascertained, or the *quantum of actual damages* is assessed If the Legislature intended to fix the date of the assessment of the actual damages as the starting point of limitation, it would have specifically expressed it in unambiguous terms It depends on the fact and circumstances of each case as to when the plaintiff suing a carrier for compensation for losing or injuring the goods really comes to know of the loss or injury to his goods

The fact that the Chief Commercial Superintendent of the Railway has mentioned that the claim of the plaintiff was under investigation and that he will be advised definitely on the finalisation of the claim cannot be construed as even an implied admission of liability. The further statement calling upon the plaintiff to abstain from rushing to Court and threatening him that he would he held liable for costs if he did so could not also be considered as an implied acknowledgment of liability, on the ground that the plaintiff was invited to desist from suit on promise of settlement.

On facts held, the claim was barred by limitation. As appellant succeeded only on ground of limitation parties were ordered to bear their respective costs in both the Courts.

Appeal against the decrees of the Court of the Subordinate Judge, Tirunelveli, dated 28th August, 1961 in Original Suit Nos 5 of 1959 and 56 of 1960.

K. C. Jacob, S. K L. Ratan and *R. Vedantham* for Appellant, *R. Gopalaswami Ayyangar* and *T. R Mani* for Respondent in A. S. No. 38 of 1962.

K C Jacob and *S. K L. Ratan*, for Appellant and *S. M. Amjad Nainar* and *S M. Abdul Kader* for Respondent in A S No. 401 of 1962.

The Judgment of the Court was delivered by

Sadasivam, J.—The Union of India owning the Southern Railway, represented by the General Manager, Madras, has preferred these appeals against the common judgment in O.S. Nos. 5 of 1959 and 56 of 1960, on the file of the Subordinate Judge's Court, Tirunelveli, decreeing the claim for damages made by the plaintiff (in each of the suits) It is an undisputed fact that the respondent in each of the appeals consigned beedi parcels with the appellant-railway on 7th September, 1957 for being transported to Colombo and that the goods were drenched by water and damaged on 17th September, 1957, the very day on which they were loaded on the ship "*S.S Irwin*" belonging to the appellant-railway The learned Subordinate Judge Tirunelveli, negatived the pleas put forward by the appellant and decreed the suits for damages.

Sri S K. L. Ratan appearing for the appellant in these appeals argued the appeals mainly on the question of limitation and also to some extent on the question whether there was negligence and misconduct on the part of the railway to make them liable for damages.

On the merits of the case, we see no sufficient ground to differ from the finding of the trial Court. The goods of the respondents were loaded in No. 3 hatch in the ship and the loading was completed at 12-10 P.M on 17th September, 1957 and the hatch was battened down. When the hatch was again opened to load other goods at about 2-45 P.M , it was found that the hold was flooded with sea water. The evidence of D W 8, Rama Rao, Marine Superintendent, Southern Railways, and the report Exhibit B-2 made by him show that there was no leak in ship and that in his opinion it appeared to be a case of planned sabotage The ship was guarded by the employees of the appellant-railway and so the only reasonable inference is that the damage should have been caused either by the wilful acts of the appellant's

employees, or by others on account of the negligence of the appellant's employees. We agree with the findings of the learned Subordinate Judge that the damage to the goods of the plaintiff in each of the suits was due to the misconduct on the part of the servants of the railway.

There is no dispute about the fact that Article 30 of the Limitation Act of 1908 applies to the facts of this case and it provides one year period of limitation for a suit against a carrier for compensation for losing or injuring goods and the time from which the period begins to run is " when the loss or injury coccurs ". In *Union of India* v. *Amar Singh*[1], it has been held that the burden is upon the defendant-railway who seeks to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit and that the proposition is self-evident and no citation is called for. In construing Articles 30 and 31 of the Limitation Act, the Supreme Court has observed in *Bootamal* v. *Union of India*[2], that ordinarily the words of a statute have to be given their strict grammatical meaning and equitable considerations are out of place, particularly in provisions of law limiting the period of limitation for filing suits or legal proceedings. Article 30 of the Limitation Act, as already pointed out, mentions that the time begins to run from the date when the loss or injury occurs. The actual loss or injury to the goods may occur on one date and the carrier may come to know of it only on a later date and the interval between the two dates may be more than one year. It would not be reasonable to construe the time from which the limitation commences to run under Article 30 of the Limitation Act of 1908 as the actual date of the loss or injury, and it is on account of this fact, the Courts rely on the date on which the carrier of the goods after coming to know of the loss or injury to the goods conveys the information to the consignor as the starting point for limitation It is common knowledge that when a person loses an article, he may not be aware of the loss immediately, but only at some later date when he needs that article and searches for it and finds it missing In *Union of India* v. *Sitaramaiah*[3], a Bench of this Court has held that under Article 30 of the Limitation Act of 1908, limitation will begin to run only from the date on which the consignee was informed of the injury to the goods.

The learned Advocates for the respondents urged that in cases where the consignor takes open delivery of the goods after ascertaining the extent of damage to the same, the period of limitation will commence to run only from the date of such open delivery In *Union of India* v. *Sitaramiah*[3], the consignee took open delivery of the goods on 21st September, 1950 and even if that date was taken as the starting point for limitation, the suit was barred by limitation and it was in that context it was observed that limitation would, in any event, start running from 21st September, 1950. We have already referred to the decision in that case that time will start to run only from the date on which the consignee became aware of the injury to the goods. In *Sultan Pillai and Sons* v *Union of India*[4], it has been held that in a suit for damage to goods against a carrier, the proper Article of the Limitation Act applicable is Article 30 and time will run from the date on which the consignee becomes aware of the damage and that the date of repudiation of the claim by the carrier cannot be the starting point of limitation in such cases. It is clear from the facts of that case that the plaintiff therein had come to know in a general way even prior to his taking open delivery on 6th December, 1956 that the tobacco consigned in that case had been wetted and damaged. It was held in that decision that limitation began to run only from 6th December, 1956 as

> " the exact nature of the injury and quantum thereof on which alone he could have claimed damages was known to him only when the goods were examined after opening each bag and ascertaining its condition "

It depends on the facts and circumstances of each case as to when the plaintiff suing a carrier for compensation for losing or injuring the goods really

1. (1960) S C J 543 . (1960) 2 S.C.R. 75 : A I R 1960 S C 233 at 238
2. (1963) 1 S C R 70 A I R 1962 S C. 1716.
3. I.L R (1961) Mad 1122 (1961) 2 M L.J. 521
4. (1963) 33 Com. Cas. 807.

comes to know of the loss or injury to his goods. Thus the above decision could be distinguished on the facts of that case If, however, the decision purports to lay down that it is only when the plaintiff comes to know the nature of the injury and the extent of the same, irrespective of prior knowledge that his goods were injured, the period of limitation would commence, it would be opposed to the plain wording of Article 30 of the Limitation Act and the decision of the Supreme Court in *Jetmull Bhojraj* v. *D. H. Railway*[1] It is clear from this decision that according to column (3) of Article 30 of the Limitation Act, the starting point of limitation would be the date of the loss or injury to the goods, though after the goods were consigned by the consignor he would not be in a position to know the precise date on which the loss or injury has occurred and that the burden would be on the railway administration who want to non-suit the plaintiff on the ground of limitation to establish that the loss or injury occurred more than one year before the institution of the suit. We have already referred to the decision in *Union of India* v *Sitaramiah*[2], where it has been held that the time will start to run from the date on which the consignee became aware of the injury to the goods. The decision in *East Indian Railway and others* v. *Gopilal Sarma*[3], that the time does not run from the date of plaintiff's knowledge and that it begins to run from the date when the injury was actually caused and that the burden of proving when the injury was caused rests upon the carrier has been cited with approval in that decision. Thus even in a case falling under Article 49 of the Limitation Act for compensation for injury to property, the period of limitation commences from the date when the property is injured The period of limitation could not be put to a later date when the extent of the injury is ascertained, or the *quantum of actual damages* is assessed If the Legislature intended to fix the date of the assessment of the actual damages as the starting point of limitation, it would have specifically expressed it in unabmiguous terms. We have alredy referred to the decision in *Bootamal* v *Union of India*[4], where it has been pointed out that the words of a statute have to be given their strict grammatical meaning and equitable considerations are out of place, particularly in provisions of law limiting the period of limitation for filing suits or taking legal proceedings.

We shall first deal with the claim of the plaintiff in O S. No. 5 of 1959, on the file of the Sub-Court, Tirunelveli. Exhibits A-14 to A-17 show that the assessment of damages to the plaintiff's goods was made on 13th November, 1957. Even if this is taken as the starting point of limitation, and two months' time required to be given to the defendant in giving notice under section 80, Civil Procedure Code is excluded, the suit should have been filed on 13th January, 1959. But the suit was actually filed on 30th January, 1959. The suit is, therefore, clearly barred by limitation. But the learned Subordinate Judge accepted the plea of the plaintiff that there was an acknowledgment of liability by the railway in Exhibit A-32, which is as follows :

> " While acknowledging receipt of your notice referred to above on behalf of your clients Messrs. Seyadu Beedi Company, Sindu Poondurai, Tirunelveli, I have to state, that the Railway is having the matter thoroughly investigated and that the cause of damage by water is being enquired, and it is hoped your clients will be advised definitely on the finalisation of the claim shortly.
>
> If, however, in the meanwhile, your clients take the matter to Court, please note and notify them that they will be held liable for all costs the Railway incur in such a proceeding."

Admittedly, there is no express acknowledgment of liability in this communication sent by the railway to the plaintiff. Sri R. Gopalaswami Iyengar appearing for the respondent-plaintiff urged that on a reading of the plaintiff's Advocate's notice Exhibit A-29 along with this letter Exhibit A-32, it will be clear that there is an implied acknowledgment of liability. The railway has merely acknowledged the

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1. (1963) 1 S.C.J. 505 : (1963) 1 An W R 1122.
(S C.) 89 : (1963) 1 M L J (S C) 89 : (1963) 3. A.I R. 1941 Cal. 304.
2 S.C.R. 832 : A I R 1962 S C 1879 at 1885 4 (1963) 1 S C.R. 70 A.I.R. 1962 S C.
2. (1961) 2 M.L.J. 521 : I.L R. (1962) Mad. 1716.

receipt of the notice Exhibit A-29 sent by the plaintiff The fact that the Chief Commercial Superintendent of the Southern Railway has mentioned in Exhibit A-32 that the claim of the plaintiff was under investigation and that he will be advised definitely on the finalisation of the claim cannot be construed as even an implied admission of liability The further statement in Exhibit A-32 calling upon the plaintiff to abstain from rushing to Court and threatening him that he would be held liable for costs if he did so could not also be considered as an implied acknowledgment of liability, on the ground that the plaintiff was invited to desist from suit on promise of settlement It is not possible to spell out an admission of liability by even a liberal construction of the letter, Exhibit A-32 The claim of the plaintiff in O S No 5 of 1959, on the file of the Sub-Court, Tirunelveli, is clearly barred by limitation

The plaintiff in O S. No. 56 of 1960, Sub-Court, Tirunelveli, took open delivery of the goods on 10th December, 1957. If he had no prior knowledge of the injury to his goods, he could certainly rely on the date of Exhibit A-64 as the starting point for limitation and the suit would be within time as found by the lower Court But the Chief Commercial Superintendent has given intimation to the plaintiff in O S No 56 of 1960, on the file of the Sub-Court, Tirunelveli, of the injury to the goods even by his letter Exhibit A-63, dated 9th October, 1957, which the plaintiff had received on 13th October, 1957, as mentioned in paragraph 5 of the plaint. Hence the period of limitation would commence to run from 13th October, 1957, and the suit should have been filed on or before 13th December, 1968. But the suit was actually filed on 17th December, 1958, after a delay of four days. The certificate of damages and shortages marked as Exhibit A-64 can hardly be construed as an express or implied acknowledgment of liability to pay compensation or damages to the plaintiff. The certificate Exhibit A-64 is only with regard to the assessment of damages to the plaintiff's goods and it has nothing to do with the liability of the Southern Railway to the plaintiff The claim of the plaintiff in O S. No 56 of 1960, on the file of the Sub-Court, Tirunelveli, is also barred by limitation.

Sri R. Gopalaswami Iyengar appearing for the respondent in Appeal No. 38 of 1962 urged that, in any event, he would be entitled to recover Rs. 4,800 mentioned in paragraph 11 of the plaint from the Southern Railway The said amount represents the duty paid by the plaintiff to the Central Excise and the plaintiff would be entitled to get a refund of the same if the goods had been exported outside India. In his notice Exhibit A-37, the plaintiff in O S No 5 of 1959, on the file of the Sub-Court, Tirunelveli, has claimed the total damages of Rs 38,455.16, as falling under two heads mentioned in paragraphs 8 and 9 of the said notice The plaint in this case is in conformity with the notice and paragraph 12 of the plaint refers to the total damages of Rs. 38,455 16 as falling under the two heads mentioned in the two prior paragraphs The claim against the Southern Railway for the entire compensation claimed in the suit is one falling under Article 30 of the Limitation Act We, therefore, fail to see how the claim for compensation for the loss of duty paid by the plaintiff in respect of which he could have got refund, if the goods had been exported outside India, would stand independent of the compensation for injury to the goods

For the foregoing reasons, the decree and judgment in both the suits, O S. No. 5 of 1959 and O S. No 56 of 1960, on the file of the Sub-Court, Tirunelveli, are set aside and the suits are dismissed on the ground that they are barred by limitation. But, in view of the fact that the appellant-railway succeeds only on the question of limitation, we direct the parties in each of the appeals to bear their respective costs in both the Courts.

S.V.J. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI

Reginald Danieal .. *Appellant.**

v

Sarojam and another *Respondents*

Guardians and Wards Act (VIII of 1890), sections 17, 19, and 25—Interpretation—Appointment of guardian of the person of child of tender years—Application by the father—Father living with a mistress in his house—Father if a fit person to have the custody of his child—Section 17 if overrides section 19

The evidence is sufficient to establish that since April, 1967, the appellant is living with Gomathi The conclusion that follows is that the appellant is living with a mistress in his house The lower Court was not correct in thinking that the appellant's conduct in relation to his wife is one of hatred Exhibits B-1 and B-2 written in the heat of passion cannot be solely relied upon to prove either that the appellant ill-treated the first respondent or that he hated her. In any case the fact that the appellant ill-treated his wife would not be relevant consideration in coming to the conclusion that he is not a proper person to have the custody of his child, nor can it be said in this case that the appellant has permitted or allowed the other persons to have the custody of his child, and therefore, he should not be allowed to have the custody of the child. The child was taken away in November, 1966 and after giving notice, the petition has been filed on 6th January, 1967. There is no delay in the appellant taking action ; this petition is not merely to forestall any action that might be taken against him for all that he has done to his wife.

When section 17 of the Guardians and Wards Act lays down that in appointing or declaring the guardian of the minor, the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, it does not mean that section 17 over-rides section 19 Only if the father is unfit to be the guardian, can the question of the welfare of the minor come into consideration. In other words, under section 17 there is no question of a guardian of his person being appointed if the father is alive and is not unfit to be the guardian. The father is entitled to be the guardian even against the mother as long as he is not held to be unfit to be the guardian of the person of his son

When an application under section 25 is filed by a father, the only consideration would be whether the father is unfit to be the guardian of his minor child If he is not unfit, no other question can arise.

A person who is living with a mistress in his house can hardly be considered to be a person fit to have the custody of his child of tender years From this point of view, it is better that the custody of the child continues to be with the mother.

Appeal against the order of the District Court, Kanyakumari at Nagercoil, dated 4th November, 1967 and made in G and W O P No 1 of 1967

S. Padmanabhan, for Appellant

T R. Ramachandran and *T R Rajagopalan*, for Respondents

The Court made the following

ORDER.—This appeal arises out of an application under section 25, Guardians and Wards Act, filed by the appellant for the custody of his son from the first respondent, his wife The appellant's case was that on 19th November, 1966 his son, aged six years, was taken away by the first respondent and is living with the second respondent, her father The first respondent contended that on 11th November, 1966 the appellant came home fully drunk, beat her and dragged her out of the house and later left the house for good, that what he did upset her mentally and as the appellant did not return to the house till 19th November, 1966, she had to leave the house Her case further was that the appellant has taken to another woman by name

* A A.O No 2 of 1968 9th August, 1968

Gomathi and he is unfit to be the guardian of the child The lower Court took the view that the point that arose for consideration was whether it was in the interests of the minor to hand over the custody of the child to the appellant and in order to determine that point it had further to decide whether the petitioner has taken to another woman by name Gomathi and married her The lower Court was of the view that the appellant had married Gomathi and that it was not in the interests of the minor to hand him over to the appellant and dismissed the petition.

I do not think that the lower Court was right in its conclusion that the appellant had married Gomathi The appellant is an Advocate and is a Christian He would certainly know that he cannot marry a second wife, while the first wife is living, whether she is a Christian or a Hindu. I do not think that the evidence of taxi-drivers R W. 3 and R W. 4 can be relied upon to hold that the appellant had married Gomathi P W 5's evidence that the appellant is now living with Gomathi cannot also prove that the appellant had married Gomathi. The evidence of P. Ws. 6, 7 and 8 also does not establish that the appellant had married Gomathi. But I think the evidence is sufficient to establish that since April, 1967, the appellant is living with Gomathi. The conclusion that follows is that the appellant is living with a mistress in his house The lower Court was not correct in thinking that the appellant's conduct in relation to his wife is one of hatred Exhibits B-1 and B-2 written in the heat of passion cannot be solely relied upon to prove either that the appellant ill-treated the first respondent or that he hated her. In any case the fact that the appellant ill-treated his wife would not be a relevant consideration in coming to the conclusion that he is not a proper person to have the custody of his child ; nor can it be said in this case that the appellant has permitted or allowed the other persons to have the custody of his child, and therefore, he should not be allowed to have the custody of the child The child was taken away in November, 1966 and after giving notice, the petition has been filed on 6th January, 1967. There is no delay in the appellant taking action , nor am I satisfied that this petition is merely to forestall any action that might be taken against him for all that he has done to his wife. I do not see how this petition can forestall any such action and even if all that the wife alleges against her husband is true apart from the fact of his keeping a mistress I do not see what action she could take against the appellant. If the first respondent can take proceedings either for judicial separation or for divorce, the very consideration mentioned by the lower Court would show that the appellant would not mind such action being taken. Therefore, the case would have to be considered without reference to the appellant's attitude towards the first respondent or without reference to the contention that the present petition is intended only to forestall any action that the first respondent might take against the appellant.

I consider that the lower Court was not correct in proceeding to determine this question merely on consideration whether it was in the interests of the minor to make him over to the appellant. Though this petition is under section 25 of the Guardians and Wards Act, sections 17 and 19 of that Act are also relevant in discussing this question. Section 17 in so far as it is relevant reads :

> "17. (1) In appointing or declaring the guardian of minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property ....."

Section 19 reads :

> "19. Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person........

(*a*) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian or her person, or (*b*) of a minor whose father is living and is not in the opinion of the Court unfit to be guardian of the person of the minor, or

(*c*) ....".

Thus in the case of a minor whose father is living and is not in the opinion of the Court unfit to be guardian of the person of the minor, no guardian can be appointed. When, therefore, section 17 lays down that in appointing or declaring the guardian of a minor, the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, it does not mean that section 17 over-rides section 19. Only if the father is unfit to be the guardian, can the question of the welfare of the minor come into consideration In other words, under section 17 there is no question of a guardian of his person being appointed if the father is alive and is not unfit to be the guardian. The father is entitled to be the guardian even as against the mother as long as he is not held to be unfit to be the guardian of the person of his son. In *Audiappa* v *Nellandrani*[1], a Bench of this Court discussed the question and observed as follows :

"The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

The learned Vakil for the appellant relies on *Bindo* v *Sham Lal*[2], which seems to lay down that if the father marries again, he ought to be deprived of his legal right of guardianship. The learned Judge refers only to section 17 and says that the welfare of the girls is the primary consideration There is no doubt that that would be the consideration which would influence the Court ultimately; at the same time, it uoght not to be forgotten that the Legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship; the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty, the same sanctity does not attach to the rights claimed by the other relations. It is for these reasons that section 19 of the Guardians and Wards Act lays down that the Court must be satisfied that the husband or the father is unfit to be the guardian of his wife or child respectively before it can appoint another person as the guardian. For these reasons we are unable to follow the decision in *Bindo* v. *Sham Lal*[2]. The decision In re *Gulbai and Lalbai*[3], deals with the guardianship of other near relations. To such cases section 19 does not apply and only consideration which should weigh with Courts is the welfare of the minor. We think the order of the District Judge is right, we must dismiss this appeal"

The Calcutta High Court in *Bimala Bala* v. *Bhagirathi Shahu*[4], has also held similarly. The relevant portion of the judgment is as follows :—

"The two sections of the Guardians and Wards Act, relevant on the point, are sections 17 and 19 (*b*) Under section 19 (*b*) the father has the undisputed right to the guardianship of his child, so long as he is not and has not become unfit for the purpose. Under section 17, it is the interest and welfare of the minor concerned, which should be the guiding factor in the matter of appointment of his guardian.

The Courts power to appoint or declare a guardian of the person and/or property of a minor is contained in Chapter II of the Act, where section 19 also occurs In that context, the opening words of section 19 may well suggest that, in view of clause (*b*) of the said section, where the father of the minor is alive and is not unfit to be the guardian of the person of the minor concerned, no question of appoint-

1. (1916) I L R. 39 Mad. 473 : 28 M L J. 442.
2. (1907) I.L.R. 29 All. 210.
3. (1908) I L.R 32 Bom 50.
4. (1961) 65 C.W N. 1138.

ment or declaration of guardian of his person will arise and the Court will have no jurisdiction to make any such appointment or declaration From that point of view, section 17, which, on its own words, applies only where the Court has to appoint or declare the guardian of a minor, may not be relevant so far as section 19 is concerned, or, to be more precise, and explicit, the said section 17 may not be strictly relevant in judging the fitness or unfitness of the father for purposes of guardianship, as contemplated in the said other section 19 of the Act. That however, does not, in our opinion, rule out altogether consideration of the question of welfare and/or interest of the minor in adjudging such fitness or unfitness of the father It will, no doubt, not be the paramount or the supreme overriding consideration in the matter as it would have been if section 17 had applied, but it may well be, and indeed, it will still be one of the matters for consideration even under section 19. The question of fitness or unfitness of a person for the guardianship of a minor cannot be wholly dissociated from the welfare and interest of the minor concerned in any case whatsoever, but while, in other cases, it will almost be the paramount or the deciding factor, in the case of the husband and the father under clause (*a*) and clause (*b*) respectively of section 19, it will only be one of the factors to be considered for judging their fitness or unfitness for the guardianship. The result will be that, merely on this ground, namely, that the minor's welfare and/or interest will be better served by some other person as guardian, the husband's or the father's position as guardian of the particular minor cannot is disturbed, or, in other words unless they are considered to be 'unfit', and distinguished from 'less fit' for such purpose, their position, as the guardian as aforesaid, should be maintained and left undisturbed. To throw them out the test should be one of unfitness and not simply relative unfitness or inferiority in fitness and, in applying such test, the interest and welfare of the minor will, *inter alia*, have to be taken into consideration "

Reliance was placed on behalf of the respondents on the decision of Ramaswami, J., in *M R. Richard* v *Mrs. Richard*[1]. The learned Judge there held that a *mala fide* application, under section 25 by a father for the custody of his daughter of tender years, who was living with her mother, filed more or less as a counterblast to the petition of the mother under section 488 Criminal Procedure Code, deserved no encouragement But as I have already held that this petition is not one intended to forestall any action, which might be taken by the first respondent, this part of the decision will not apply. The learned Judge also held that in deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not *ipso facto* entitle him to custody and that the principal considerations or tests which have been laid down under section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under section 25 The learned Judge does not lay down that a mother can be appointed in preference to the father as the guardian of the minor child merely because the welfare of the minor is the paramount consideration. But he does lay down that in an application under section 25, the welfare of the minor would be the paramount consideration Whether different considerations arise, when the application is one under section 25 as distinguished from cases to which section 19 applies, I shall consider later The learned Judge after pointing out the considerations against transferring the custody of the minor to the father and how the interests of the minor are paramount held that the fact that the father is the natural guardian would not '*ipso facto*' entitle him to custody The learned Judge goes on to observe that in fact there is often must confusion in regard to clause (*b*) of section 19 of the Act, which states that "nothing in this chapter shall authorise the Court to appoint or declare guardian of the person of the minor whose father is living and is not, in the opinion of the Court, unfit to be the guardian of the person of the minor", that all that clause (*b*) means is that the Court cannot appoint a father as guardian under the Guardians and Wards Act; that he is the natural lawful guardian of his own minor children, but that if the father make an application

1. A.I.R. 1955 Mad. 451.

for guardianship for the purpose of obtaining the custody of the child from another, the application will be treated as one under section 25 of the Act. With great respect to the learned Judge I am unable to agree with him that all that clause (*b*) of section 19 means is that the Court cannot appoint a father as guardian under the Guardians and Wards Act Nor, in my opinion, is the learned Judge correct in saying that if the father makes an application for guardianship for the purpose of obtaining the custody of the child from another, the application will be treated as one under section 25. There can be no question of the father applying to be appointed guardian for such a purpose In making this observation, the learned Judge has not taken into consideration the observations of the Bench of this Court in *Audiappa* v. *Nallendrani*[1], to which I have already referred. I do not think that there is any confusion with regard to clause (*b*) of section 19 As I already pointed out, I think it is quite clear that except where the father is unfit, nobody else can be appointed as guardian of the minor and the question of the welfare of the minor without reference to the unfitness of the father does not come in at all. Reliance was also placed upon the decisions in *Bai Tara* v *Mohanlal Lalubhai*[2] and *Saraswathi Ved* v *Shrinad Ved*[3]. In *Bai Tara* v. *Mohanlal Lalubhai*[2] the learned Judges held that in an application under the Guardians and Wards Acts made by the father to obtain custody of his minor son, the only question to be considered is whether it will be in the interests and welfare of the minor to return to the custody of the father. They relied upon the decision of the Privy Council in *Annie Besant* v. *Narayaniah*[4]. The Privy Council case was not one where the conflicting claims of a father and a mother arose. The only relevant portion in the Privy Council judgment is that no order declaring a guardian could, by reason of the 19th section of the Guardians and Wards Act, 1890 be made during the respondent's life (father's life) unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case Now to my mind this observation itself shows that the father would be also entitled to the custody of his minor son. In *Saraswathi Ved* v. *Shrinad Vasanli Ved*[3], also it was held that the paramount consideration in the matter of the custody of a minor of tender years in the interest of the child rather than the rights of the parents and that human nature being much the same all the world over, if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years and consequently the mother is preferrable to the father in such case. One may not disagree with the learned Judges when they say that if the mother is a suitable person, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years and consequently the mother is preferable to the father in such case If they intend to lay it down as a proposition of law, it does not seem to be well founded. No doubt they refer to the earlier decision of the Bombay High Court in *Zai Tara* v. *Mohan'al*[2] and that of the Privy Council in *Annie Besant* v *Narayaniah*[4], is referred to only for purposes of showing that among Hindus, as in England, the father is the natural guardian of his children during their minority.

The question, should, therefore be decided on the basis of sections 17, 19 and 25 of the Guardians and Wards Act and the relevant consideration would, therefore, be whether in considering the application under section 25 considerations different from those that apply in cases where sections 17 and 19 are involved. With great respect to the learned Judges who have decided otherwise, I am of the view, that the decision of the Bench of this Court in *Audiappa* v. *Nallendrani*[1], as well as the Privy Council decision in *Annie Besant* v *Narayaniah*[4], would seem to point out that the considerations cannot be different. If under section 17 of the Act, the welfare of the minor would be an overriding consideration for the appointment of a guardian when the father is alive only if he is held unfit under the provisions of section 19 (*b*), I do not think that different considerations apply in applications under section 25. A guardian is entitled to the custody of his ward, the other person questioning

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1 (1916) I L R 39 Mad 473 28 M L J 442
2 A I R 1922 Bom 405
3. A I.R 1941 Bom. 103
4 (1915) I L R 38 Mad. 807 : 41 I.A 314 : 27 M.L J 30 (P C.)

his right to the custody of the child cannot claim that it is in the interests of the minor that the minor should be with him or her The very fact that the Court has appointed the person putting in an application under section 25 as a guardian under section 17 would be an answer to such a contention, because the Court should be deemed to have taken into consideration the welfare of the minor, when it appointed the applicant under section 25 as the guardian of the minor. If it is so, the father who has a right, superior to that of anybody else, to be the guardian of the minor even without being so appointed by Court, cannot have lesser rights. The reason behind section 19 is obviously to recognise that the father's right to the guardianship of his minor child is supreme and it is for the welfare of the child except where he is unfit. Both the Benches of the Bombay High Court, which decided the cases already referred to have not considered the implication of section 19 of the Guardians and Wards Act. It follows, therefore, that when an application under section 25 is filed by a father, the only consideration would be whether the father is unfit to be the guardian of his minor child If he is not unfit, no other question can arise. As observed by the Bench which decided the case in *Audiappa* v. *Nallendrani*[1], the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The Bench has taken the view that there is a sanctity attaching to the right claimed by the father. The present case has, therefore, to be considered on the basis whether the father in this case can be said to be unfit.

I have already held that the appellant could not have married Gomathi If he had married Gomathi and it was permissible under the personal law that would not be a bar to his application under section 25 being granted. But under the personal law applicable to the appellant, he cannot take a second wife while the first wife is living He has not divorced the first respondent. He should, therefore, be deemed to be living with a mistress in his house and a person who was living with a mistress in his house can hardly be considered to be a person fit to have the custody of his child of tender years. From this point of view, it is better that the custody of the child continues to be with the mother. As pointed out by the Bench in *Saraswathi* v. *Shrinad Ved*[2], orders as to the custody of a child being always of a temporary nature those interested in the minor are at liberty to apply to the Court at any time for the change of minor's custody.

The appeal is dismissed.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Nagalakshmi Ammal and others .. *Appellants**

v.

Rajagopala Iyer and others .. *Respondents*

Will—Construction—Bequest to a woman—Absolute interest or life interest—Mention of woman's daughters—No words of gift over—Proper construction.

Under a will executed in 1907 one *S* bequeathed certain properties to his daughter-in-law, *A* The plaintiffs are the daughters of one of *A*'s daughters, *R*. The defendants are the alienees from *R* herself The question is whether the effect of the will is to give an absolute estate to *A*, so that her daughter as streedhana heir would only have a life interest in the property and, therefore, after her death in 1953, the defendants would have no further rights in the property or whether what *A* got was a life interest and *R* took an absolute interest after her and the defendants therefore get absolute title.

Held, the grandfather must have expected that the daughter-in-law would give the properties to her own daughters Even so it is provided that she was to give

1 (1916) I L R 39 Mad. 473 . 28 M L J 442

2. A I R. 1941 Bom 103

* S.A. No. 1152 of 1964. 19th July, 1968.

it to her daughters as she pleased The reference to the grand-daughters was only an expectation rather than a mandatory direction or even a recommendation.

It is now well settled that merely because a property is given to a Hindu woman, a limited interest is not to be inferred It is always a question of construction. In most of the cases where a life interest is said to be taken by a woman, there is always a gift over to some other person and in such case, it could very well be said that what was given to the first person was only a life interest

There is no such gift over in the instant case. There is no power of appointment. Therefore the daughter-in-law got an absolute estate There was no cutting down of the effect of the earlier portion by which she was directed to enjoy the properties for her life time which are words of wide import.

Appeal against the Decree of the District Court of West Thanjavur at Thanjavur in Appeal Suit No 214 of 1962 preferred against the decree of the Court of the District Munsif of Mannargudi in Original Suit No. 167 of 1961.

T R Srinivasa Iyer, for Appellants.

K. C. Srinivasan, T. R. Ramachandran and *Venugopal*, for Respondents.

The Court delivered the following

JUDGMENT.—By a will dated 21st August, 1907, one Srinivasa Iyengar bequeathed certain properties to his daughter-in-law, Alamelu. The interpretation of the will and its effect is the question to be decided in the second appeal The plaintiffs are the daughters of one of Alamelu Ammal's daughters, Rajammal. The defendants are alienees from Rajammal herself. The question is whether the effect of the will is to give the absolute estate to Alamelu Ammal, so that her daughter as streedhana heir would only have a life interest in the property and, therefore, after her death in 1953, the defendants would have no further rights in the property or whether what Alamaleu got was a life interest and Rajammal took an absolute interest after her and the defendants therefore get absolute title to the suit properties. The relevant portions of the will are found in page-6 of the trial Court's judgment. The Courts below have held that the effect of that will is to give a life interest to Alamelu and absolute interest to her daughters after her life It appears to me that the decision of the Courts below cannot be supported

In *Karunakaran Stephen* v *Administrator-General of Madras*[1], where an Indian Christian gave his property to his wife saying " After me she should enjoy the said properties and she should at her death divide and give (the same) to those three persons, *i e.*, *A*, *B* and *C*, according to her wishes" it was held that there was an absolute bequest in favour of the wife and not a mere life estate coupled with a power of appointment. Krishnan, J., observed " it is not a case at all of any power of appointment. It is merely a case of absolute bequest to the widow with a recommendation to her, so as to deal with the properties in the manner mentioned which is not binding on her."

I am unable to see how the fact that the parties in that case were Christians makes any difference to the principle applicable because in this case the parties are Hindus, as considered by the learned District Munsif Reliance was also placed on behalf of the respondents on the decision of the Supreme Court in *Lakshmana Nadar* v. *Ramier*[2]. There, the will was as follows :

" After my life time you, the aforesaid *B*, my wife, shall *till your life time*, enjoy the aforesaid entire properties, the outstandings due to me, the debts payable by me, and the chit amounts payable by me After your life time *L*, our daughter and wife of *M* and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange, and sale from son to grandson and so one for generations, ... "

1. (1925) 49 M L J 197 (1953) I M L J 834
2. (1953) S.C J 420 . (1953) S C R. 848 ,

Considering the effect of this will, their Lordships observed as follows at page 836:

"Considering the will in the light of these principles, it seems to us that Lakshminarayana Iyer intended by his will to direct that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and her heirs with powers of alienation, gift, exchange and sale from generation to generation He wished to make his daughter a fresh stock of descent so that her issue, male or female, may have the benefit of his property They were the real persons whom he earmarked with certainty as the ultimate recipients of his bounty In express terms he conferred on his daughter powers of alienation by way of gift exchange, sale, but in sharp contrast to this, on his widow he conferred no such powers The direction to her was that she should enjoy the entire properties including the outstandings, etc, and these shall thereafter pass to her daughters Though no restraint in express terms was put on her powers of alienation in case of necessity, even that limited power was not given to her in express terms. If the testator had before his mind's eye his daughter and her heirs as the ultimate beneficiaries of his bounty, that intention could only be achieved by giving to the widow a limited estate, because by conferring a full Hindu widow's estate on her the daughter will only have a mere *spes successionis* under the Hindu Law which may or may not mature and under the will her interest would only be a contingent one in what was left undisposed of by the widow It is significant that the testator did not say in the will that the daughter will enjoy only the properties left undisposed of by the widow The extent of the grant so far as the properties mentioned in the schedule are concerned, to the daughter and the widow is the same Just as the widow was directed to enjoy the entire properties mentioned in the schedule during her life time, in like manner the daughter and her heirs were also directed to enjoy the same properties with absolute rights from generation to generation They could not enjoy the same properties in the manner directed if the widow had a full Hindu widow's estate and had the power for any purpose to dispose of them and did so If that was the intention, the testator would clearly have said that the daughter would only take the properties remaining after the death of the widow"

In that case, there was a gift over after the lifetime of the widow granting specifically an absolute interest in favour of the daughter There is no such gift over in this case

In *Aiyathurai* v. *Municipal Council Kumbakonam*[1], a Bench of this Court had to consider a will in the following terms :

"The properties obtained by me by way of partition of my maternal grandfather's properties and the jewels worn by my wife *B* shall be taken by *B* alone, who will be entitled to enjoy them throughout her life, thereafter *B* can dedicate them to any charity she might desire But the house situate to the west of my residential house shall be enjoyed by *B* for the duration of her life-time. Thereafter she shall make a gift of the same to any one of my brother *C's* sons who might be beholden to her."

The Bench interpreted the first portion of the will as giving an absolute estate to *B* the widow and the second portion as giving her a limited interest because there was a mandatory direction that she should give the house to the west of the residential house to any one of the testator's brother's sons. In that case, the words used in respect of the estate taken by the widow was "ஆயுள் முழுவதும் அனுபவித்து வந்து". In the present case, the word used is: "ஆயுசு பரியநதம் அனுபவிததுக்கொண்டு பிறகு''. Both mean exactly the same thing In considering the effect of these words, the Bench observed as follows . *See* page 601 :

"The words 'ஆயுள் முழுவதுமம அனுபவிதது வந்து' (enjoy) is of wide import. The word enjoy itself will include within it, power of alienation, etc.,

1. I L R. (1965) 1 Mad 598.

unless there be other indications in the document to show that a more limited meaning was intended. An example of the latter kind is found where property is given to a person to be enjoyed in apparently wide terms but there are other dispositions of the same property by way of remainder or otherwise. In such a case, difficult questions will arise whether the latter disposition of the property is invalid as being repugnant to the former, or only thus reveal an intention in the donor to restrict the apparently absolute estate conferred on the first taker."

Discussing further the provision that where the testator provided that *B* was to enjoy the properties obtained by the testator by way of partition for life and thereafter she can dedicate them to any charity she might desire, they have taken the view :

"Applying the principles referred to above, we are unable to find either a trust or a power of appointment in favour of the charity in the first clause of the will. What was intended was a mere recommendation to devote the properties to such charities as Bagirathi might choose. Probably, Ranganathan Chettiar expected that his wife would respect his wishes. But that cannot mean that her powers over the properties were in any way curtailed "

Similarly, in the present case also, the grandfather Srinivasa Iyengar must have expected that the daughter-in-law would give the properties to her own daughters Even so it is only provided that she was to give it to her daughters as she pleased. Unlike in the case just mentioned where the direction to give to the testator's brother's sons was in a mandatory form, any reference to the grand daughters was only an expectation rather than a mandatory direction or even a recommendation. As in the other case, Srinivasa Iyengar probably expected that his daughter-in-law would respect his wishes and give it to the grandchildren.

It is now well-settled that merely because a property is given to a Hindu woman, a limited interest is not to be inferred It is always a question of a construction. In most of the cases where a life interest is said to be taken by a woman, there is always a gift over to some other person and in such case, it could very well be said that what was given to the first taker was only a life interest There is no gift over in this case There is no power of appointment There is no trust created. Therefore, what Alamelu got was an absolute estate There was no cutting down of the effect of the earlier portion by which she was directed to enjoy the properties for her life which as explained by the Bench in *Aiyathurai* v *Municipal Council, Kumbakonam*[1], are words of wide import. If Srinivasa Iyengar had really intended to create a life interest in favour of his daughter-in-law and an absolute right in favour of the grand daughters, he might have said that he was giving it to the daughter-in-law for maintenance. He might have put in words limiting her powers of alienation or he might have stated that after her life time, her daughters were to take it. He has done none of these things It is, therefore, clear that what Alamelu got under the will was an absolute estate The appellants are, therefore, entitled to succeed.

The second appeal is, therefore, allowed and the plaintiffs' suit would stand decreed. But the parties will bear their own costs throughout No leave

V S. *Appeal allowed.*

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1. I.L.R. (1965) 1 Mad. 598.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Velappan Pillai .. *Appellant**

v

Parappan Panickar and others . *Respondents.*

Civil Procedure Code (V of 1908), Order 22, rules 1, 3 and 4—Interpretation—Death of the second defendant—Failure of the plaintiff to bring the legal representatives on record in time Power of the Court to exempt the plaintiff from substituting legal representative under rule 4 (4)—Suit if abates under rule 4 (3).

Civil Procedure Code (V of 1908), Order 22, rules 4 (1) and 9—Scope—Suit by puisne mortgagee against the prior mortgagee—Original mortgagor if a necessary party or a pro forma *party—Rules relating to abatement if apply—Contesting respondents not suffering any prejudice—Preliminary decree deemed to have been passed in the presence of the second defendant also before his death.*

Under Order 22, rule 1 the mere death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The further provisions provide when, notwithstanding the survival of the right to sue, there will be abatement. Order 22, rule 3 (2) provides for the abatement of the suit when no application is made to bring on record the legal representatives of a deceased plaintiff within the time limit. Coming to Order 22, rule 4 which provides the procedure in the case of death of one of several defendants or of a sole defendant, sub-clause (1) provides for an application to be made for causing the legal representatives of the deceased defendant to be made a party when one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or sole defendant or sole surviving defendant dies and the right to sue survives Sub-clause (3) then comes in and it is provided that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant except as hereinafter provided.

The abatement of a suit against the deceased defendant is provided for only under sub-clause (3) if within the time limit an application to bring on record the legal representative has not been made But an exception is engrafted in this provision by the words *except as hereinafter provided* and that brings in sub-clause (4), which enable the Court to exempt the plaintiff *whenever it sees fit* from substituting the legal representatives of a deceased defendant, who had been declared *ex parte.*

The expression *whenever* properly means only at *whatever occasion.* But exactly interpreted *when* refers to a point of time and *where* to a place or state of things. A reference to any standard grammar of English words or English dictionary would show, that *whenever* is an intensified form of *when* ordinarily meaning *no matter when, at any time when.*

Rule 4 must be read as a whole, having also in view rule (1). Where abatement takes place under the rules the abatement may be automatic Abatement on death is specifically provided for under rules 3 and 4. Sub-rules (3) and (4) of rule 4 must be read together. Sub-rule (3) will not operate in cases where an order under sub-rule (4) is made Statutorily the automatic operation of sub-rule (3) is taken away when an exemption is granted under sub-rule (4). This is because sub-rule (3) itself provides sub-rule (4) as its exception and full effect has to be given to the exception.

While broadly stated in a suit by a puisne mortgagee against the prior mortgagee the original mortgagor could be a necessary party and will be at any rate a proper party there may be cases where he may be considered to be a wholly *pro forma* party, having no interest in the result of the litigation. If a person is

* S A. No 1739 of 1963 21st December, 1967.

pro forma respondent, having no interest in the litigation, the rule providing for abatement cannot apply. Rule 4 applies to cases where one of two or more respondents dies and the right to sue does not survive against the surviving respondent or respondents alone or a sole respondent or sole surviving respondent dies and the right to sue survives.

Rule 9 states that on abatement no fresh suit shall be brought on the same cause of action Reading rule 4 (1) with rule 9 it is clear that there is no question of any abatement in the case of a purely *pro forma* respondent.

The contesting respondents, it may be pointed out, have suffered no prejudice by their not being brought on record earlier They cannot put forward any case inconsistent with what could have been urged by the second defendant. The other heirs of the second defendant have been there already on record. The only defence that had been put forward to the action was based upon the agreement, Exhibit A, and (this Court has in the connected appeal negatived the interest of other persons in the mortgaged properties. It follows that when (this) Court passed the preliminary decree it must be deemed to have pronounced the decree in the presence of the second defendant also before his death took place. The application for final decree, in the circumstances, seeking to have the final decree passed in the presence of not only of those heirs of the second defendant already on record but also others is quite in order having been made within three years of the preliminary decree

The provisions of Order 22, rule 4 (4) could be availed of at any time before judgment.

It is true that when the present second appeal was originally pending there is no sub-rule corresponding to sub-rule (4) of Order 22, rule 4 It was submitted that abatement having automatically taken place under Order 22, rule 4 as it stood in the Travancore-Cochin State there could be no exemption later in this Court But these are purely procedural rules and actions in this Court are regulated according to the rules governing second appeals in this Court:

Appeal against the decree of the Subordinate Judge, Padmanabhapuram, in Appeal Suit No 205 of 1962, preferred against the decree of the District Munsif of Kuzhithurai in Interlocutory Applications Nos. 1186 and 1443 of 1961 and 673 of 1962 in Original Suit No 206 of 1123, M. E.

P. Anantakrishnan Nair, for Appellant.

S Padmanabhan, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal by the plaintiff arises out of proceedings for final decree in the suit for redemption. To appreciate the problems raised in the case, it is necessary to set out briefly the history of the proceedings leading to the preliminary decree in the suit.

The suit property belonged to one Vyakulam, the widow of one Innasi. She settled it on the husband of her daughter Chandanom, and after legal proceedings against strangers in possession of the property commenced by her husband and continued by her after his death, Chandanom acquired title to the property. Chandanom had a sister Anthonial and two brothers, Chinnian and Innasi Soosah. Anthonial was the younger sister Chandanom had no issue. She entered into an agreement with her brothers for them to inherit the property after her death, providing for her enjoyment of the property during her lifetime. She settled a portion of the property on her sister, Anthonial for her marriage as strindhana and also incurred expenses for the marriage She had borrowed moneys for the litigation to recover possession of the property, and after the death of her brother Chinnian leaving his widow and children, Chandanom along with her surviving brother, Innasi Soosah, the widow and children of Chinnian and her sister Anthonial, and her husband she executed an usufructuary mortgage in favour of the first defendant in the redemption suit out of which this second appeal arises. That was on 9th April,

1944, securing 8,405 fanams Subsequent to this usufructuary mortgage, Chandanom and two of the sons of Chinnian, along with Anthonial's husband, Anthonial being dead meanwhile, executed a subsequent usufructuary mortgage of the property in favour of the present plaintiff, the consideration being the discharge of the usufructuary mortgage in favour of the first defendant, and a further amount of 2,625 fanams. The consideration for discharge of the earlier usufructuary mortgage was reserved with the present plaintiff In between the dates of the two mortgages a fourth share in the property had been sold in execution of a decree obtained against Innasi Soosah. This suit for redemption has been filed by the subsequent mortgagee seeking to redeem the earlier usufructuary mortgage in favour of the first defendant in the suit. The first mortgage has been exhibited as Exhibit B and the second mortgage (othi and Kushikanom), under the title acquired by which to the enquiry of redemption, the suit for redemption is instituted, is exhibited as Exhibit 8. Claiming title and interest in the properties under the agreement between Chandanom and her brothers, above referred to, disputes were raised by two of her nephews as to the validity of of this second mortgage, Exhibit 8, and also of the Court sale above referred to in the decree obtained against Innasi Soosah. The fourth and the fourteenth defendants in the redemption suit, one of the sons of Chinnian and one of the sons of Anthonial, the son of Chinnian not being a party to Exhibit 8 and the other being a minor at the time of the execution of Exhibit 8 questioned the Court sale above referred to and the validity of the usufructuary mortgage, Exhibit 8 by the suit Original Suit No 459 of 1122 M E To this suit the plaintiff in the redemption suit was made the first defendant The first mortgagee was made a party to that suit as the 11th defendant Innasi Soosah and others of the family were also parties ; as also Chandanom. In the suit for redemption the plaintiff the present appellant impleaded as parties, the original mortgagee, the person in possession of the plaint schedule property under the mortgage, Exhibit B for 8,405 fanams as the first defendant, and defendants 8 to 13 as persons alleged to be in possession under the first defendant. Defendants 6 and 7 were added as persons whose marriage expenses also had necessitated the borrowing under Exhibit 8. As stated already the fourth and the fourteenth defendants are the persons who questioned the validity of the second mortgage in Original Suit No 459 of 1122, M E. The other children of Chinnian and Anthonial were also made parties to the redemption suit. Only Innasi (Soosah) was not made a party The suit for redemption of the mortgage, and the suit in which the validity of Exhibit 8 was challenged, were both tried together and the Principal District Munsif of Kuzhithurai on 27th January, 1953, decreed the suit for redemption and dismissed the suit questioning the validity of the mortgage, Exhibit 8. On appeal the suit for redemption was dismissed, as not supported by consideration, and the other suit for declaration was allowed.

Appeals in these cases had originally been instituted in the Travancore-Cochin High Court and were subsequently transferred to this Court on the re-organisation of States The appeal in the suit for redemption came to be numbered as Second Appeal No 1189 of 1956 and the number of the other second appeal is Second Appeal No. 1251 of 1956 This Court on the second appeals held that the restraint on Chandanom's powers of alienation in her agreement with her brothers was void, and that she was free acting for herself to alienate the property It was found that neither for the purpose of having the debts incurred discharged nor for the purposes of ensuring their succession to the property after her lifetime could she and her brothers enter into any valid agreement by which she would be prohibited for all time from alienating the property except with their consent This Court held that on the terms of the agreement which was exhibited as Exhibit A, it was not possible to hold that Innasi Soosah, in a decree against whom a portion of the property was sold, had any interest in the property which could be attached and sold in execution of a decree obtained against him. It was found that the purchaser from him in execution of the decree acquired no interest in the property in his favour under the Court sale This Court held that the plaintiffs in the suit, Original Suit No. 459 of 1122 M. E., wherein

the validity of Exhibit 8 was challenged had no interest in the property to entitle them to maintain the suit. It was said that neither Anthonial nor Chinnian, the deceased sister and brother of Chandanom, acquired any interest in the property under Exhibit A Finding consideration for the mortgage exhibit 8, duly established this Court on the second appeals dismissed the suit, Original Suit No 459 of 1122 M E and granted a preliminary decree for redemption in Second Appeal No 1189 of 1956. The plaintiff was granted three months time for paying the mortgage money. At the hearing, it was represented in the redemption suit that the mortgage money had been deposited in the trial Court during the pendency of the suit. Thereupon this Court ordered that if that was so and the money had been withdrawn by the mortgagee or was available for being withdrawn by him, the appellant will be entitled to apply for final decree straightaway It is pursuant to this preliminary decree passed by this Court, an application was made in the trial Court for the passing of a final decree. This Court's decree was passed on 17th October, 1959 and Interlocutory Application No 1186 of 1961, the application for the passing of the final decree was filed on 28th October, 1961.

The real contest in the final decree proceedings arises this way Pending the second appeal, the second defendant, Chandanom, who was shown as the fifth respondent in Second Appeal No 1189 of 1956 died On her death, as pointed out by the trial Court in this matter, a memo was filed in this Court on 9th July, 1956, on which it was recorded by this Court on 17th July, 1956, that there was none to be impleaded as the legal representative of the deceased fifth respondent, *i e*, the second defendant. In the other second appeal, Second Appeal No 1251 of 1956 in Civil Miscellaneous Petition No 11132 of 1956, on the death of Innasi Soosah, his heirs were brought on record as legal representatives by order, dated 31st March, 1959 The final decree application was opposed by defendants 4 and 14, that is, the plaintiffs in Original Suit No 459 of 1122 M E. on the basis that the action had abated for the reason that the legal representatives of the second defendant had not been brougt on record in time Thereupon in the final decree application, Interlocutory Application No 1186 of 1961, the plaintiff applied by Interlocutory Application No 1443 of 1961, to add as party-defendants in the suit, the legal representatives of Innasi Soosah who alone of the heirs of the second defendant were not already on record This was opposed, the main contention being that Chandanom had died pending the second appeal, and neither Innasi Soosah, nor his heirs had been added as her legal representatives in the second appeal In the connected matter the legal representatives of Innasi Soosah had been impleaded. Now the plaintiff was seeking to get the heirs of Innasi Soosah as the legal representatives of the deceased second defendant after a number of years after there had been an abatement as against the second defendant To maintain the application, the excuse put forward was *inter alia* that in the connected suit, the heirs of Innasi Soosah had been impleaded This naturally was not accepted The trial Court observed that the plaintiff ought to have impleaded Innasi Soosah as the legal representative of the second defendant when the she died and later on his death brought on record his heirs as legal representatives and no diligence had been shown in the matter An irresponsible charge has been made that his Counsel in this Court had acted against his interest by filing a memo, dated 9th July, 1956 Quite properly this plea was rejected The Court then proceeded to hold that in the circumstances there was an abatement of the second appeal, so far as the second defendant was concerned In this view the final decree for redemption was confined to the other persons on record The decree specifically provided that the plaintiff could take delivery of possession of the property from the defendants barring the second defendant and her legal representatives.

On appeal therefrom before the learned Subordinate Judge, for the plaintiff reliance was placed, on Order 22, rule 4, Civil Procedure Code, as it stands in this State, and it was contended that it was not necessary to implead the legal representatives of the deceased second defendant, who had been *ex parte*. Certain other contentions were also put forward ; but they do not merit consideration. The learned

Subordinate Judge over-ruled the case based on Order 22, rule (4) and took the view that there has been an abatement. He over-ruled the plea that there could be no abatement in the case. He held that there was no valid decree binding on the second defendant The plaintiff had claimed mesne profits from the date of deposit This had not been considered by the trial Court and the appellate Court allowed this claim of the plaintiff as against the other defendants at a specified rate. It is in these circumstances that the plaintiff has come up to this Court in second appeal, contending that there could be no question of abatement in respect of the second defendant in the suit. A ground has also been raised that mesne profits should have been awarded from the date of deposit of the mortgage money. The principal grievance in the second appeal, as I see it, is that in the final decree as now provided, it is said that the plaintiff could take delivery of possession of the property from the defendants barring the second defendant and her legal representatives.

Learned Counsel for the appellant contends that the record by this Court on the memo, dated 17th July, 1956, filed by the plaintiff noting that none need be impleaded as the legal representatives of the second defendant must be deemed to be an order by this Court under Order 22, rule 4 (4), which runs thus :—

> "The Court, whenever it seems fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing ; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place."

In the alternative it is submitted that there are already some legal representatives of Chandanom on the record, *i.e*, the heirs of Anthonial and Chinnian and there being sufficient representation of the estate, there can be no question of abatement. It is submitted that there is substantial representation of the estate of Chandanom as the plaintiff is now, seeking to implead only the heirs of the deceased Innasi Soosah and the second defendant was just a *pro forma* defendant. It must be said that there is substance in the contentions. The actual memo filed in this Court, on which orders were passed by this Court, is not available But clearly there is a note by this Court of the death and that on the memo no legal representative of the second defendant is added. It is contended by the learned Counsel for the appellant that if it was a question of any abatement this Court would not have passed the decree in terms in which it has been made, not if it had recorded the abatement. Notwithstanding the fact of death having been brought to the notice of the Court, this Court had not been shown that the case has abated as against the second defendant, but has accepted the position that none need be brought on record. The contention has been that she had provided for succession to her by the agreement, which had been put forward by the plaintiffs in Original Suit No 459 of 1122 M E. and they were parties to the second appeal No contention was raised by any of the respondents there on record that there was an abatement If Order 22, rule 4 (4) could be applied in the circumstances it is said one can quite properly presume that the order was one passed under Order 22, rule 4 (4) It is said that the absence of a formal petition supported by affidavit has not stood in the way of the Court passing an order. The Courts are not debarred from passing orders in such matters without formal petitions. If Order 22, rule 4 (4) could be applied to the case it must be taken that the estate of Chandanom is bound by the decree, as if the decree has been passed before the death of Chandanom. Once that view can be taken, when the application for final decree is made all the heirs of Chandanom could be made parties to that application That would not be a case of bringing on record the legal representatives governed by the rules of limitation applicable to bringing on record legal representatives under Order 22 rule 4 (1) The Article of Limitation Act applicable in such cases would be Article 181 of the Limitation Act (IX of 1908).

But Mr Padmanabhan, learned Counsel for the contesting respondents, submits that Order 22, rule 4 (4) cannot apply to this case. It is said that an order under Order 22, rule 4 (4) must be made before there has been an abatement by death and not after. Learned Counsel submits that under Order 22, rule 4 (3) abatement takes place if within the time limit no application had been made under Order 22, rule 4 (1) and after abatement there can be no question of exempting the plaintiff from the necessity of substitution of the legal representatives of the deceased. For this position reliance is placed by learned Counsel on two decisions : *Nani Gopal* v. *Panchanan*[1] and *Lakshmi Charan* v. *Satyabadi*[2]. These decisions, no doubt lay the proposition as contended for the respondents It is held that where no application has been made for substitution under Order 22, rule 4 (1), Civil Procedure Code, and no order for exemption has been made under the provisions of sub-rule (4) of rule 4 of the Order the suit shall abate and the Court's power to exempt under Order 22, rule 4 (4) can be exercised only before an abatement has taken place and cannot be exercised after abatement has taken place.

In *Nani Gopal* v *Panchanan*[1], the lower Court held that so long as a formal order of abatement had not been passed the Court may grant an exemption. This view was rejected by the High Court as if the suit has abated, the effects of abatement ensue even though the Court has not recorded a formal order that the suit has abated. Having carefully examined the reasoning in the two judgments cited, with respect, I am unable to agree with the view taken therein that the power of exemption under Order 22, rule 4 (4) can be exercised only before the abatement has taken place and not after. In my view the decisions do not give sufficient emphasis to the words "whenever it sees fit" in sub-clause (4) In *Nani Gopal* v *Panchanan*[1], the learned Judges are of the view that the words " whenever it sees fit " cannot be interpreted to mean " at any time before the suit has been disposed of " According to the learned Judges the sequence of events as contemplated in Order 22, rule 4 leads to the inescapable position that where no application has been made for substitution under sub-rule (1) and no order for exemption has been made under the provisions of sub-rule (4) within the time limit the suit shall abate. On such abatement there is nothing before the Court so far as the deceased defendant is concerned in which any order whether for exemption under sub-rule (4) or another order can possibly be passed.

In *Lakshmi Charan* v. *Satyabadi*[2], referring to the words "whenever the Court sees fit" it is said that in the context it must mean that when the Court sees fit within ninety days from the date of death and before abatement takes place. It is said that within the period of ninety days, two courses are open to the appellants either to file an application for substitution or to file an application praying for invoking the Court's power to exempt them from the necessity of substituting the legal representatives of the deceased. The Orissa High Court follows the judgment of the Division Bench of the Calcutta High Court in *Nani Gopal* v. *Panchanan*[1]. Now when during the pendency of a suit against the defendant the first question that falls for consideration is whether the right to be sued against, survives or not. If it does not, there is an end of the suit If it does, then the suit can be continued but nothing could be done immediately until the party who could contest is brought on record. On the death of a party an action is in a state of suspense and proceedings will have to be taken under the provisions of Order 22 Under Order 22, rule 1 the mere death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The further provisions provide when, notwithstanding the survival of the right to sue, there will be abatement. Order 22, rule 3 (2) provides for the abatement of the suit when no application is made to bring on record the legal representatives of a deceased plaintiff within the time limit. Coming to Order 22, rule 4 which provides the procedure in the case of death of one of several defendants or of a sole defendant : sub-clause (1) provides for an application to be made for causing the legal representatives of the deceased defendant to be made a party when one of two or more defendants dies and the right to sue does not survive against the surviv-

1. (1954) 59 C.W N. 304. 2. A.I.R. 1964 Orissa 39.

ing defendant or defendants alone, or sole defendant or sole surviving defendant dies and the right to sue survives. Sub-clause (3) then comes in and it is provided that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant except as hereinafter provided The words " except as hereinafter provided " came in by the amendment which introduced sub-rule (4) already set out. At the same time Order 41, rule 14 (1) relating to service of notice of appeal on the respondent was also amended by adding the Proviso.

> " Provided that the appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred "

The abatement of a suit as against the deceased defendant is provided for only under sub-clause (3) if within the time limit an application to bring on record the legal representative has not been made. But an exception is engrafted on this provision by the words "except as hereinafter provided" and that brings in sub-clause (4) which enables the Court to exempt the plaintiff "whenever it seems fit" from substituting the legal representatives of a deceased defendant, who had been declared *ex parte*. For the respondents, relying on the decisions above cited, it is said that two exceptions are provided for by sub-rule (3) from an abatement taking place . (*i*) an application to bring on record legal representatives , (*ii*) the exemption under sub-rule (4). If neither of these events had taken place in time it is said that the suit automatically got abated In the result, it is contended that if after the expiry of the period the plaintiff wants to proceed further in the matter he must have the abatement set aside and then apply either for bringing on record the legal representatives or for dispensing with substitution

In my view this is to limit the force of the expressions " except as hereinafter provided " in sub-rule (3) and the words " whenever it sees fit, in sub-rule (4). The expression "whnever " properly means only at " whatever occasion. " But exactly interpreted " when " refers to a point of time and " where " to a place or state of things A reference to any standard grammar of English words or English dictionary would show, that "whenever " is an intensified form of "when" ordinarily meaning "no matter when, at any time when" In *Stroud's Judicial Dictionary* the meaning of the word "whenever" is brought out thus :-

> " Where a clause in a lease provides for forfeiture, ' if and whenever' rent is in arrear, that means as often as the rent shall remain in arrear at any moment of time, and the forfeiture is not waived by a distress which does not yield sufficient to satisfy the rent due.
>
> ....
>
> But ' whenever it appears' to the county council that a house or room for dancing, music, or such like, ' is so defective in its structure ' as to be in danger from fire (section 11, Metropolis Management Act, 1878-41 & 42 Vict., c. 32) does not mean ' so often as ', but means that at ' whatever time it so appears.' "

As said in *Craies on Statute Law* in approaching the question of interpreting words used in statutes it is necessary to keep in mind the presumption that words in a statute are strictly and correctly used. Unless we are compelled by the context we should take it that language used, has been used exactly. It may be said that the existence of a given set of circumstances requiring the exercise of judicial discretion is also is in time. But why limit the scope of the words ? If it was not intended to permit exemption at any time, these words "whenever it sees fit" in sub-clause (4) could well have been omitted, the discretion being left with the Court to exempt the plaintiff with the necessity of substitution according to the circumstances The words " may exempt" themselves import the need for exercise of judicial discretion. The amendment of Order 22 by the addition of words to sub-rule (3) and the insertion of the new sub-rule (4) was pursuant to the recommendations of the Civil Justices Committee The Civil Justices Committee had recommended that after the trial had commenced it should be open to the Court to absolve the plaintiff from the necessity to substitute the representative of the defendant who did not in

his lifetime file a written statement, or who having done so did not appear to contest at the hearing It was considered as a device to avoid useless substitution of representatives on the death of a party The Committee had also suggested that on appeal it should be made possible in a proper case to obtain an order dispensing with the need to substitute the heirs of the respondents who took no part at the trial as some of the unnecessary expenses and trouble might more safely be eliminated. These are rules of procedure suggested by experience and expediency and if the interpretation contended for the respondents is accepted the object may not be achieved. It is suggested for the respondents that if the time limit for an application to bring on record the representatives of an *ex parte* respondent had expired, the appellant, if the circumstances warrant dispensing with the service of the innumerable representatives of the deceased, must first have the abatement of the appeal set aside under Order 22, rule 9 : But to have the abatement set aside notice will have to go to the legal representatives and it is meaningless that after notice had gone to them and they had appeared the appellant should seek exemption from substitution of the legal representatives The provision is in respect of an *ex parte* defendant or respondent, who has taken no interest in the litigation and particularly when under the rules, in an appellate Court notice even need not be sent to him, his death may not come to the knowledge of the appellant in time. In such cases the sub-rule will be a dead letter if the respondent's contention is accepted.

The question so far as our Court is concerned, in my view, must be considered settled by the decision in *Lakshmanan Chettiar* v *Chidambaram Chettiar*[1]. In that case the contention raised before the learned Judges was that Order 22, rule 4 (4) had no application to appeals, and that the learned Judges who passed an order under that rule had no jurisdiction to exempt the appellant from the necessity of substitution. The validity of the order in that case arose in execution proceedings. The ninth defendant in the suit had contested the suit and the suit was dismissed with costs. There was an appeal to the High Court and in the High Court the ninth defendant was impleaded as the eighth respondent. He did not enter appearance on service of notice He had died in June, 1927 and on his death belatedly petitions were filed (*i*) to excuse the delay which had occurred ; (*ii*) to set aside the abatement of the appeal and (*iii*) bring on record the legal representatives of the deceased. This Court dismissed the petitions observing that under Order 22, rule 4, Civil Procedure Code, no legal representatives need be impleaded. The appeal was heard in due course and the suit was decreed, directing the respondent to put the legal representatives of the plaintiff in possession. In the execution proceedings the legal representatives of the ninth defendant who were sought to be impleaded objected and raised various defences, questioning *inter alia* the validity of the order under Order 22, rule 4 (4). This Court held that the learned Judges, who passed the order under Order 22, rule 4 (4), had jurisdiction to pass it, and that the appellate decree had the same force and effect as if it had been pronounced before the party in question died The order of the lower Court in that case bringing on record the legal representatives was confirmed. No doubt the contention in the present form was not raised before the Court and decided. But clearly this Court upheld an order passed under Order 22, rule 4 (4) after an abatement had taken place, and the fact of abatement had been brought to the notice of this Court specifically praying even for setting aside the abatement The petition for setting aside the abatement was dismissed along with the petition to bring on record the legal representatives of the deceased defendant. Eminent Counsel had appeared for the parties in that case and certainly if the defence in the form now submitted before me was available that would have been presented before the Court The question raised was one of jurisdiction and Counsel contented himself with raising the plea that Order 22, rule 4 (4) was not applicable to appeals. I have discussed the matter apart from the inference I am making by implication from this decision In my view the provisions of Order 22, rule 4 (4) could be availed of at any time before judgment.

1. 68 M L J. 318 : (1935) I.L.R. 58 Mad. 752.

In *Jag Mohan* v. *Ramiah*[1], though it does not appear whether there was an abatement, the learned Judges observed that the rule comes into operation in cases where the plaintiff learns that death of one of the defendants took place before judgment is delivered and the Court is invited to enter judgment against that defendant also. Rule 4 must be read as a whole, having also in view rule (1). Where abatement takes place under the rules the abatement may be automatic. Abatement on death is specifically provided for under rules 3 and 4. Sub-rules (3) and (4) of rule 4 must be read together. Sub-rule (3) will not operate in cases where an order under sub-rule (4) is made. Statutorily the automatic operation of sub-rule (3) is taken away when an exemption is granted under sub-rule (4) This is because sub-rule (3) itself provides sub-rule (4) as its exception and full effect has to be given to the exception

It is contended by Mr S Padmanabhan, learned Counsel for the respondents, that in the Travancore-Cochin Court wherein the present second appeal was originally pending there is no sub-rule corresponding to sub-rule (4) of Order 22, rule 4. It is submitted that abatement having automatically taken place under Order 22, rule 4 as it stood in that State, there could be no exemption later in this Court. But these are purely procedural rules and actions in this Court are regulated according to the rules governing second appeals in this Court. It is not even a case where an order of abatement has been specifically passed by the Travancore-Cochin Court. In fact it is not even made out before me, that as against the deceased defendant the appeal had abated even when it was pending in that Court Whatever that may be this Court after having been specifically appraised of the death of the second defendant proceeded to record the same and did not regard that there has been an abatement of the appeal in so far as the deceased, second defendant is concerned.

The appellant seeks to sustain the appeal on the further ground that the second respondent was in fact a *pro forma* respondent, and there could be no abatement in such a case. The suit was by the puisne mortgagee to redeem the first mortgage and secure possession from the first mortgagee. The plaint proceeded on the basis that the first defendant, that is the first mortgagee was in possession of the property and defendants 8 to 13 were persons in possession under the first defendant. The second defendant was impleaded only as the owner of the property, who had executed the mortgages. Certain others who had contested the validity of the second mortgage on the basis of which redemption was sought were also impleaded as party-defendants The second defendant did not dispute the right of the plaintiff to redeem the first mortgage He was *ex parte* and did not even file any written statement. In the circumstances, even if he had not been made a party to the action the plaintiff could have had the relief he wanted in the suit. In the connected suit the validity of the second mortgage had been upheld and it had been held that none other than the second defendant had interest in the suit property. While broadly stated in a suit by a puisne mortgagee against the prior mortgagee the original mortgagor could be a necessary party and will be at any rate a proper party there may be cases where he may be considered to be a wholly *pro forma* party, having no interest in the result of the litigation. If a person is *pro forma* respondent, having no interest in the litigation, the rule providing for abatement cannot apply Rule 4 applies to cases where one of two or more respondents dies and the right to sue does not survive against the surviving respondent or respondents alone or a sole respondent or sole surviving respondent dies and the right to sue survives. We do not speak of the existence of a right to sue against or the survival of the right when no relief is sought against a particular respondent Rule 9 states that on abatement no fresh suit shall be brought on the same cause of action Reading rule 4 (1) with rule 9 it is clear that there is no question of any abatement in the case of a purely *pro forma* respondent. But it is unnecessary for the purpose of the present case to consider this aspect of the matter.

Equally another ground for appeal urged does not call for any elaborate consideration It is submitted by the appellant that there are other heirs of the second

1. A.I.R. 1962 Andh. Pra. 165.

defendant already on record and that therefore, there has been substantial representation It is submitted that when already there are legal representatives of the deceased on record there can be no question of abatement. As I am satisfied that this is a case where Order 22, rule 4 (4) applied and the order made by this Court on 17th July, 1957, must be deemed to be one made having regard to that provision, it is unnecessary to examine the tenability of the other arguments submitted for the respondents. The contesting respondents, it may be pointed out, have suffered no prejudice by their not being brought on record earlier. They cannot put forward any case inconsistent with what could have been urged by the second defendant. The other heirs of the second defendant have been there already on record. The only defence that had been put forward to the action was based upon the agreement, Exhibit-A, and this Court has in the connected appeal negatived the interest of other persons in the mortgaged properties It follows that when this Court passed the preliminary decree it must be deemed to have pronounced the decree in the presence of the second defendant also before his death took place The application for a final decree, in the circumstances, seeking to have the final decree passed in the presence of not only of those heirs of the second defendant already on record but also others is quite in order having been made within three years of the preliminary decree.

In the result the second appeal is allowed Interlocutory Application No 1443 of 1961, is ordered as prayed for Interlocutory Application No 673 of 1962 (for excusing the delay) in the view I take of the matter, is superfluous and is therefore, dismissed Consequently the final decree passed by the trial Court has to be modified, deleting from sub-clause (*iii*) thereunder the words "barring the second defendant and his legal representatives" and omitting the words in all other respects in sub-clause (*iv*) The relief in respect of mesne profits granted by the lower appellate Court shall stand. In the circumstances of the case the parties will bear their costs in the final decree proceedings throughout. No leave

V M K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M NATESAN

Gopalakrishnan .. *Appellant**

v.

Balasubramania Chettiar and others .. *Respondents*

Hindu Law—Trading family—Implied authority to borrow by kartha for family business—Alienation to discharge debts—Whether binds son—Duty of alienee.

Adequacy of consideration is certainly a necessary element The price stipulated must be fair. If the price is unreasonably low, it will be sacrificing the family property and may suggest want of *bona fides* and improper pressure. The presence of pressure for cost and involvement in debt establish existence of necessity. Question of proof of *bona fide* enquiry can arise only in cases where there are no debts and factually there is no necessity.

If the father had decided to sell a property rather than raise money on mortgage the fact that a portion of the consideration had not gone in discharge of debts will not affect the alienation. The question is whether there was any legal necessity for the alienation. It is for the father to choose whether the property should be sold and funds raised or other kind of alienation resorted to.

It is well established that the managing member of a trading family has wider powers than those of the manager of a non-trading family. Of course acts done by the manager must be for the benefit or necessities of the family But acts like the incurring of debts are necessities to a trading family. Credit is the very essence of trade and the existence of business creates the necessity for borrowing

* S.A. No. 707 of 1963. 28th April, 1967.

and purchasing on credit The power of a manager therefore to carry on the family trade necessarily implies a power to pledge the property and credit of the family, for the ordinary purposes of that trade In the case of a trading family, those who deal with him (the manager) and to whom he incurs debts are not put upon enquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business , for the kartha of a joint Hindu family which carries on a family business had implied authority to borrow money for its purposes.

The alienee is required to establish legal necessity for the transaction and it is not necessary for him to show that every bit of the consideration which was advanced was actually applied for meeting family necessity.

Appeal against the decree of the District Court of Coimbatore in Appeal Suit No 136 of 1960 (*in forma pauperis*) preferred against the decree of the Subordinate Judge of Coimbatore in Original Suit No 97 of 1955 (*in forma pauperis*).

S Thiyagaraja Ayyar, K S Naidu and *R Vijayan*, for Appellant

T R Srinivasan, V Venkatesan, V Narayanraj, R Ramamurthi Ayyar, S. Mohan, S Ramalingam and *T. Sathiadev*, for Respondents

The Court delivered the following

JUDGMENT —The plaintiff who has substantially failed in the Courts below has filed this second appeal The suit, ostensibly and in the ultimate one for partition and separate possession of the plaintiff's 1/3 share in the properties of a joint Hindu family with consequential reliefs, is in the main one challenging the alienations made by the plaintiff's father The first defendant in the suit is the father and the second defendant, the younger brother of the plaintiff Defendants 3 to 14 are alienees from the father Defendants 10, 11 and 14 did not contest the plaintiff's claim and except in respect of items 6, 7 and 10 in the plaint in which they were said to be interested, the plaintiff's claim for partition was rejected A preliminary decree for partition was granted to the plaintiff as against the *ex parte* defendants in respect of the items in which they were stated to be interested Of the contested items that were made the subject-matter in the second appeal the arguments in Court were confined to items 2, 3, 4, 5, 8 and 9 only In the Courts below one of the main planks of attack was that the debts incurred by the father were in a speculative and hazardous new business, that the business was not the ancestral business of the family, and that the alienations for discharge of the debts of the business would not therefore, bind the son. There are of course the usual allegations that the father was weak minded, taken to immoral ways and that the alienations were for discharge of *avyavaharika* debts Averments were also made that there was no necessity for the sales, and that in some of the cases the properties were sold for in adequate consideration.

The parties are Vysias whose *Kulachara* is trade Even during the lifetime of the plaintiff's grandfather, the family had trade in rice, groceries and gunpowder. It was a flourishing business with considerable annual income It is stated that the first defendant in 1924 started a new business, the business being in cotton and groundnuts, and that he entered into forward contracts in respect of these commodities. It is the expansion in this business which is characterised as speculative in character. Between 1924 and 1928 the first defendant had incurred a liability of over 2 lakhs of rupees and according to the plaintiff this led to the partition in the larger joint family between the first defendant, and his brothers The partition was on the 9th August, 1928, and is evidenced by the partition deed Exhibit A-1. A major portion of the debts incurred was directed to be discharged by the first defendant, he being allotted more properties for the said purpose. All the outstandings due to the business it is said, were also allotted to the first defedant besides lands buildings, etc The plaintiff charges his father with continuing his speculative and hazardous business in grounduts and cotton even after the partition and incurring debts between 1928 and 1932 It is admitted by the plaintiff in his plaint

that by 1932 the first defendant had discharged the debts undertaken by him in the partition deed selling properties and realising the outstandings It is stated that even after setting apart properties for discharge of debts in the partition substantial properties were left with the first defendant. It is alleged that still he became worse after the partition and incurred debts by his immoral life. According to the plaintiff as a prudent man the first defendant ought not to have continued the business. The alienees sought to sustain the sales in their favour contending that the alienations were effected for the discharge of antecedent debts, that the business in groundnuts and cotton was neither a new nor speculative business, and that at any rate the business was started even before the plaintiff was born It was pleaded by the defendants that the alienations were fully supported by consideration, and that the debts were all incurred for the purposes binding on the family, by the first defendant who was a very careful and prudent manager

The Courts below have examined the several alienations in detail taking each alienation separately for consideration The Courts below have, in considering the validity of the alienations, referred to the legal principles applicable in the matter by reference to decided cases. The questions raised were approached for consideration on correct legal principles The Courts below found that the alienations were valid and binding on the plaintiff They held that there was legal necessity for the alienations and the debts for discharge of which the alienations were made were binding debts. They found that the business carried on by the first defendant was neither speculative nor hazardous. The business was started when the first defendant was joint with his brothers He had continued the business after the partition in the family in 1928 The plaintiff is the eldest son of the first defendant and he was born only in August, 1933 It was not open to the plaintiff in the circumstances to contend that his father had embarked the ancestral assets on a hazardous and speculative business Even in 1924 the family had a ginning factory. The first defendant purchased cotton, ginned and sold the same to mills at Coimbatore The family had a grocery business and was also trading in rice According to the modern concept of business in the circumstances it cannot be held that the business embarked upon by the first defendant was new and speculative and debts incurred therein would not bind the members of the family It must be noticed that it was during the continuance of the business after the partition, that the first defendant discharged debts to the tune of two lakhs which he was directed to discharge under the partition deed When the new line of the business was started, the first defendant was the sole coparcener He as the sole coparcener was entitled to start the new business with the joint family funds (See *Sakthivel* v *South Indian Bank*[1] Learned Counsel for the appellant, therefore, did not challenge before me that the debts incurred are in consequence of a speculative ventures and, therefore, they cannot bind the family Learned Counsel does not even challenge the truth or genuineness of the debts referred to in the impugned alienations nor does he contend that the debts cannot properly form the consideration for the alienations in question What is urged before me for the appellant is that in respect of some of the alienations there has been no adequate consideration, and that in respect of some of them a good part of the consideration was cash It is stated that in such cases where only a part of the consideration had gone in discharge of the debts, in the absence of proof that the cash had also been applied for discharge of the debts or *bona fide* enquiry by the alienees as to the necessity for alienation had been made the alienations must fail It is also stated that a mere recital in a deed of alienation that the alienation was for discharge of debts generally without specifying the debts will not be sufficient, and that the alienee must prove existence of debts for the discharge of which the alienation was effected or enquiry by the alienee of existence of the debts The Courts below have examined the impugned alienations with reference to the adequacy of consideration and also the application of the balance when upholding their validity. If they have approached the question from the right legal perspective and applied the legal principles to the evidence on record, really there is little left in the matter for consideration in second appeal

1 (1957) 2 M L J 502 I L R (1958) Mad 15

Reference was made by learned Counsel for the appellant to *Kailash Nath* v. *Tulshi Ram*[1], to emphasise that the adequacy of the price was an important factor when considering the validity of an alienation, that it was not merely enough that the consideration was calculated to relieve the necessity, and that even though the consideration was devoted to the payment of the just debts, it was not open to the father to sacrifice the family properties for an inadequate consideration Learned Counsel also cited *Parmanayakam* v. *Sivaraman*[2], where it was held :

" Where an alienation is made by a father or manager of a joint Hindu family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other coparceners, impugning the alienation, to have the alienor's share allotted to him and also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated."

I do not see how the decision in *Sri Nath* v *Jagannath*[3], which was cited would be of any help to the appellant. It is observed therein at page 397.

" .. ..the true question which calls for an answer in such cases is whether the sale itself was one which was justified by legal necessity. Whether any portion was or was not required for family necessity is not the most important question What we have to decide is whether the sale of the property was itself for necessity."

Referring to *Gouri Shankar* v. *Jiwan Singh*[4] Sulaiman, J , states in *Sri Nath* v. *Jagannath*[3] .

" In *Gouri Sharkar's case*[4] Their Lordships have explained their meaning on page 791 in the following words : The real question that has to be considered is this whether the sale itself was justified by necessity. Their Lordships cannot go back upon that decision. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price This view has been re-affirmed by their Lordships in *Ram Sunder Lal's case* (*Ram Sunder Lal* v. *Lachmi Narain*)[5], where at page 437 after remarking that the material question, however, is whether the sale itself was one which was justified by the legal necessity, Their Lordships proceeded to point out that a substantial portion of the consideration had been used for legal necessity, that due inquiries as to the necessity had been made by the purchaser and that the consideration was adequate. Their Lordships at page 438 upheld the deed on the findings that the sale was effected after due inquiry, that the sale was for adequate consideration and that legal necessity had been proved to the extent of Rs. 7,744 out of Rs 10,767 even though the defendants after a long interval of time had not been able to prove how the surplus was applied "

Adequacy of consideration is certainly a necessary element. The price stipulated must be fair. If the price is unreasonably low, it will be sacrificing the family property and may suggest want of *bona fides* and improper pressure. A few more of the cases cited on either side may also be referred to before going into the case on its merits and examining whether the principles of law have been properly applied.

In *Anant Ram* v. *Collector of Etah*[6], the Judicial Committee observed :

" If the necessity cannot be established by direct evidence it may be assumed, if it can be shown that reasonable care was taken to ascertain if such circums-

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1. I L R (1946) All. 457. 460
2 (1952) 1 M L J 308 · I.L R (1952) Mad 835, 865 (F B).
3. (1929) I L R. 52 All 391
4. (1927) 53 M L J. 786 (P.C).
5 (1929) 57 M L J. 7 · I L R. 51 All. 430 (P C)
6 (1917) 34 M.L J 291 : I L R 40 All. 171, 175 (P C.).

tances existed and the transferee acted ingood faith (section 38, Transfer of Property Act). In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage, made, for example, by a widow who has only a similar limited power of disposition."

Learned Counsel for the alienees stressed one aspect of the matter in the case, namely, that the family was a trading family and was engaged in trade. It was urged that the matter must be examined in the background that the father was admittedly having an extensive trade. He had been able to discharge considerable debts between 1928 and 1932 during the course of the trade. Of course he was also incurring debts in the course of the trade The business was a running one. Learned Counsel submitted that a father in charge of a business may borrow for the purpose of the business. In *Ram Charan Lonia* v *Bhagwan Das Maheshri*[1], cited by learned Counsel, the Judicial Committee observed .

"No funds were available to stay the no longer remote possibility of all value in the equity of redemption being extinguished , money also was needed for payment of other trade debts that had accrued, as well as for the development of the family cloth business then recently initiated. In these circumstances, a transaction even involving the disposal by Gopal Das of this entire immovable family property might well be justifiable and be binding on the whole family, provided the property was not sacrificed for an inadequate price and provided the consideration was calculated to relieve the necessity, the existence of which called for the disposition."

For the alienees reference was also made to *Niamat Rai* v. *Din Dayal*[2], where Their Lordships observed at 600 :

"The *onus* was, of course, on the defendants to show that the sale was justified but it must be borne in mind that in this case the first defendant, Lachhman Das, and the minor plaintiffs were the members of a joint family who had succeeded to what is known as a joint family business—that is to say, a business carried on with joint family funds for the benefit of the joint family, that the properties of the joint family, both movable and immovable, including the shares of minor members of the family, are liable for debts incurred in carrying on the business and that it is within the powers of the managing member in a proper case to sell immovable *as well as the movable property for the purpose of discharging such debts or enabling the business to be carried on*" (italicised is ours.)

Dealing with the question that the debts did not exhaust the consideration, Their Lordships observed at 603 :

"Even if there had been no joint family business, proof that property had been sold for Rs. 43,500 to satisfy pre-existing debts to the amount of Rs 38,000 would have been enough to support the sale without a showing how the balance had been applied, as held by their Lordships in the recent case of *Sri Krishan Das* v. *Nathu Ram*[3].

Where there is a joint family business the manager, as already pointed out, has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business. The learned Judges of the High Court were of opinion that, as in this case the business had recently resulted in loss, the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of by sale. As regards the latter question, it is not clear that borrowing probably at a high rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide. It was equally a question for the Manager whether it would be better to raise more money or to close down the business and it would, in their

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1. L R (1926) 53 I A 142 : I.L R 48 All 443, 447 (P.C)
2 (1927) I L R. 8 Lah 597 (P C).
3. (1926) L R 54 I A 79 . 52 M L J 720 : I L R 49 All 149 (P C.)

Lordships' opinion, be unreasonable to require a lender or purchaser to go into question of this kind, as to which he would rarely be in a position to form a sound opinion "

The observations immediately above cited would apply directly to most of the contentions raised for the appellant If the father had decided to sell a property, rather than raise money on mortgage the fact that a portion of the consideration had not gone in discharge of debts will not affect the alienation. The question is whether there was any legal necessity for the alienation It is for the father to choose whether the property should be sold and funds raised or other kind of alienation resorted to. It may be that by mortgaging the property the amount required may be raised In the present case the father decided to sell the properties for meeting the needs of the business and also paying sundry trade debts.

It is well established that the managing member of a trading family has wider powers than those of the manager of a non-trading a family Of course acts done by the manager must be for the benefit or necessities of the family But acts like the incurring of debts are necessities to a trading family Credit is the very essence of trade and the existence of business creates the necessity for borrowing and purchasing on credit The power of a manager therefore to carry on the family trade necessarily implies a power to pledge the property and credit of the family, for the ordinary purposes of that trade. As pointed out, in Mayne's *Hindu Law*, eleventh edition, at page 389 in the case of a trading family:

" Those who deal with him (the manager) and to whom he incurs debts are not upon enquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business, for the karta of a Hindu joint family which carries on a family business has implied authority to borrow money for its purposes "

With reference to the contention that the entire purchase-money must be shown to have been applied in the payment, the principles in this regard stated in Mulla's *Hindu Law* twentieth edition at page 350 may be set out:

" It sometimes happens that joint family property is sold by the father of a joint family for the payment of an antecedent debt, but the whole of the price is not proved to have been applied in payment of such debt and the sale is challenged by the sons on that ground In such a case, if the sale was necessary to discharge the debt, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied in payment of the debt does not invalidate the sale, the reason being that the purchaser is not bound to see to the application of the price If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been appplied in payment of the debt is considerable or small."

Cases illustrative of the position giving the cost portion of the price and the antecedent debt part of it are found collected under footnote (*a*) at page 218 and in footnote (*b*) at page 280 in *Mulla's Hindu Law*, twentieth edition. Reference was also made to a recent decision of the Supreme Court in *Radhakrishnadas* v *Kaluram*[1], where the decisions in *Sri Krishna Das* v *Nathu Ram*[2] and *Niamat Rai* v *Din Dayal*[3], are referred to and it is stated:

" It is well established by the decisions of the Courts in India and the Privy Council that what the alienee is required to establish is legal necessity for the transaction and that it is not necessary for him to show that every bit of the consideration which he advanced was actually applied for meeting family necessity "

The impugned alienations were between 1936 and 1940 The evidence is that the first defendant was heavily involved in debts P W. 3 admits in evidence

1 (1963) 1 S C R 648 · A I R 1967 S C 574, 576
2 (1926) L R 54 I A 79 52 M L J 720 I L R 49 All 149 (P C)
3 (1927) I L R. 8 Lah 597 (P C.).

that the first defendant was suffering from financial difficulties in 1935, 1936, 1937 and earlier years It is stated that he was badly in need of money for his business, and it is admitted that he was discharging the earlier family debts to the tune of two lakhs allotted for him to discharge, gradually by selling portions of his property After the 1928 partition he is stated to have invested about Rs 40,000 in the business, and that he continued to horrow and conduct business. The argument in fact before the lower appellate Court was not that the cash received at some of the sales was not applied in discharge of debts, but that the debts were illegal and under pressure he sold the properties It was stated that he sold some of the items for inadequate prices The first defendant, the father who is best fitted to speak about the inadequacy of consideration for the sales on sacrifice, has not chosen to go into the box. The plaintiff would not examine him The appellate Court is of the view that the suit must have been instituted in consultation with the first defendant Sundry business debts cannot be expected to be specified in detail in the deeds The presence of pressure for cost and involvement in debts establish existence of necessity Question of proof of *bona fide* enquiry can arise only in a case where there are no debts and factually there is no necessity. It is nobody's case that the cash considerations received were misapplied and were not spent in discharge of debts or for the benefit of family in the business It cannot be said on the evidence that the sales in question were uncalled for and not warranted in the circumstances of the family at that time The father was heavily indebted and P W 3 admits that hard cash was needed by the family. And as regards inadequacy for price, as held by the learned District Judge, the plaintiff has not been able to show that the consideration for any of the sales was unreasonably low. The learned District Judge who has confirmed the decision of the trial Court has addressed himself to the questions that came up for consideration before him in the light of the well-established legal principles after duly referring to them and comes to his conclusion on a review of the entire evidence on record I have myself reviewed the evidence and I can see no ground for disturbing the concurrent findings of the Courts below within the limited scope of a second appeal

In the result the second appeal fails and is dismissed. No costs. No leave.

S V J —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE T. VENKATADRI.

Chidambaram Chetty and another .. *Appellants**

v.

Sakku Bai *alias* Lakshmi Bai and another .. *Respondents.*

Madras Agriculturists Relief Act (*IV of* 1938), *section* 9-A (10) (*ii*) (a)—*Words 'transfer* inter vivos' *in the sub-section—Meaning of—Execution of a will bequeathing the equity of redemption—If amounts to 'transfer* inter vivos' *as to attract the sub-section*

'*Inter vivos*' which means living persons will exclude transfer by will as it is a fundamental principle that when a will is executed bequeathing property to a person the will takes effect only after the death of the testator It cannot therefore be contended that 'transfer *inter vivos*' within the meaning of section 9-A (10) (*ii*) (*a*) of the Madras Agriculturists Relief Act will also include transfer by execution of will bequeathing properties to heirs and beneficiaries Mere execution of a will bequeathing the equity of redemption in a mortgage will not therefore attract the provisions of section 9-A (10) (*ii*) (*a*) of the Act

Appeal against the decree of the District Court, West Tanjore in A S No. 43 of 1962, preferred against the decree of the District Munsif's Court of Tanjore in O.S No 198 of 1961

* S. A No. 1321 of 1963. 24th July, 1967.

R. Sundaralingam, for Appellants

D Ramaswamy Ayyangar and *R. Krishnamachari*, for Respondents.

The Court delivered the following

JUDGMENT —Defendants are the appellants The suit is for redemption of the properties belonging to one Santhanaramaswami Raja. He had *othied* the properties to the first defendant on 25th April, 1927 The first defendant is thus the mortgagee represented by his mother, the second defendant, since the first defendant was minor at the time of the mortgage The sum secured was about Rs 1,500 and the period fixed for redemption was seven years The mortgagee was directed to pay from and out of the sum of Rs. 1,500 Rs 800 to one Pakirisami Naidu, who was the prior *othidar* in respect of one item and Rs 700 borrowed in cash for litigation expenses of the mortgagor. The defendants did not pay the prior mortgagee *i e.*, Pakirisami Naidu, and they did not get possession of that item of the properties which was in his possession Therefore, the mortgagors redeemed the property in O S No. 171 of 1956 on the file of the District Munsif's Court, Tanjore, from Pakkiriswami Naidu and took possession. The mortgagees were in possession of items 2 and 3 as *othidars* for the amount of Rs. 700 Santhanaramaswami Raja executed a registered will on 25th June, 1946, bequeathing the *othied* properties to the first plaintiff and the second plaintiff, his daughter and grand daughter respectively. They filed the present suit to redeem the suit properties. While redeeming, they also claimed that the *othied* debt was liable to be scaled down under section 9-A of the Madras Agriculturists Relief Act, IV of 1938, and as admittedly the *othidars* were in possession of the suit properties for over thirty years, they were entitled to redeem the suit properties without payment of any money.

The first defendant remained *ex parte* and the second defendant contested the suit. Her case was that section 9-A of the Act would not apply, that the plaintiffs were not entitled to the benefits of that provision and that therefore the plaintiffs were bound to pay the whole *othi* amount. The second defendant also claimed that she was a woman entitled to the exemption provided in section 4 (*h*) of the Act.

The trial Court found that section 9-A was not applicable to the suit *othi* and that the second defendant was not entitled to exemption under section 4 (*h*) of the Act. It further found that the defendants would be entitled to get the sum of Rs. 700 which they had advanced in cash. Accordingly a preliminary decree for redemption was passed on the condition of the plaintiffs depositing into Court a sum of Rs. 700 and the balance of deficit Court-fee But on appeal, the lower appellate Court, while confirming the finding of the trial Court that the second defendant was not entitled to the exemption provided under section 4 (*h*) of the Act, held that the plaintiffs were entitled to redeem the suit properties without payment of any money, as they were entitled to get the benefits of section 9-A of the Act. The lower appellate Court directed the defendants to surrender possession of items 2 and 3 to the plaintiffs Aggrieved by this order, the defendants have preferred this second appeal.

The question for consideration is whether the plaintiffs are entitled to redeem the suit properties without payment of any money under the provisions of section 9-A of Act IV of 1938.

The appellants contend that the respondents-plaintiffs would not get the benefits of section 9-A of the Act, since the appellants are entitled to get the benefits of sub-section (10) (*ii*) (*a*) of section 9-A. That sub-section runs as follows,

"Nothing contained in this section (section 9-A) except sub-sections (1) and (2), shall apply to any mortgage. . .... .(*a*) where during the period after 30th September, 1937, and before 30th January, 1948, the equity of redemption in the property subject to the mortgage has devolved either wholly or in part on a person, by or through a transfer *inter vivos* either from the original mort-

gagor or from a person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos* then to the whole of such part, as the case may be "

Learned Counsel for the appellants contend that during such period the original mortgagor Santhanaramaswami Raja executed a will bequeathing the suit properties to the plaintiffs, and therefore, it was a transfer *inter vivos* from the original mortgagor who died on 30th January, 1947 If it is a transfer *inter vivos* section 9-A of the Act would not apply to the plaintiffs and therefore they cannot ask the Court to scale down the debt The learned District Judge has observed that the expression "transfer *inter vivos*" used in the sub-section would mean transfer between two living persons It is true that Santhanaramaswami Raja executed a will during his life time bequeathing the equity of redemption in favour of the respondents It is not a transfer *inter vivos* for the reason that a will would come into effect only after the lifetime of Santhanaramaswami Raja But learned Counsel for the appellants contend before me that when Santhanaramaswami Raja during his lifetime executed a will bequeathing the equity of redemption in favour of the respendent, it was a devolution of interest in the mortgaged properties on the respondents herein and that it was immaterial when the will takes effect. Santhanaramaswami Raja during his lifetime made a devolution of interest in the mortgaged properties to the respondents herein and therefore section 9-A will not apply to the respondents In this connection he has invited my attention to a passage in the Full Bench decision of our High Court in *Kothalavalli Achi* v *Ayyadurai Odayar*[1]

"The Transfer of Property Act relates only to transfer by act of parties and not to those by operation of law, the term "*inter vivos*" means between living persons; but the section does not merely refer to a transfer *inter vivos* thereby implying that the transaction should be made between the persons named in a document as vendor and purchaser It speaks of a devolution by transfer from the mortgagor and employs the passive voice suggesting thereby that it would comprehend cases where there has been no act of the mortgagor It is implicit that 'devolution by transfer, *inter vivos* is used in contradistinction with devolution under law and should therefore include all cases of transfer whether it be by the act of party or a forced one under the law "

Counsel for the appellants wants this Court to treat the execution of the will bequeathing the equity of redemption to the respondents as transfer *inter vivos* as the Full Bench ruling will apply to all cases of transfer whether it be by act of parties or a forced one under the law I am unable to agree with this contention of learned Counsel for the appellants. The Full Bench was considering the question whether section 9-A was confined to usufructuary mortgages as defined in section 58 (*d*) of the Transfer of Property Act and whether the sale of equity of redemption in Court auction was covered by sub-section (10) (ii) (*a*). The Full Bench held that section 9-A was not restricted in its application to usufructuary mortgages as defined in section 58 (*d*) of the Transfer of property act but applied to all mortgages by virtue of which the mortgagee was entitled to remain in possession of the property mortgaged and that sub-section (10) (*ii*) (*a*) of the Act would apply to all sales of equity of redemption whether by act of parties or by operation of law. But we are concerned here with the words "*inter vivos*" and their interpretation on the facts of this case. It is a fundamental principle that, when a will is executed bequeathing property to a person the will takes effect only after the death of the testator. The meaning of *inter vivos* as given in Black's Law Dictionary 2nd edition page 645 is this:

"Between the living, from one living person to another. Where property passed by conveyance, the transaction is said to be *inter vivos* to distinguish it from a case of succession or devise So an ordinary gift from one person to another is called a gift *inter vivos* to distinguish it from a donation made in contemplation of death (*mortis causa*)"

Similarly, in Words and Phrases, the following interpretation is given·

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1 (1961) 2 M L J. 427, 433 (F B).

"Where a man, in the full possession of his faculties, executes and delivers the necessary instruments to convey his property to his brother, with the intent that the gift shall take effect immediately unconditionally, such a gift is *inter vivos* and not *causa mortis* even though at that time he is in extremis, since a gift *causa mortis* must be conditioned upon the death of the donor.

A gift '*inter vivos*' is distinguishable from a will in that such a gift may be made by parol and, upon the acceptance of the gift by the donee, the gift is irrevocable by the donor. While ordinarily a will is required to be in writing, and usually is made in view of the fact of death, and is ineffective until the death of the testator and the admission of the will to probate"

In the Indian Succession Act "will" is defined in section 2 (*h*) as meaning the legal declaration of the intention of the testator with respect to his property which desires to be carried into effect after his death In *Raja Parthasarathi Apparao* v. *Raja Venkatadri Apparao*[1], a Full Bench of this Court has observed that the Transfer of Property Act applies only to alienations *inter vivos* and has no application to disposal of property by will Now *inter vivos* which means living persons will exclude transfer by will, for a will operates from the death of the testator In *Vannappa* v *Sinnathayee*[2], it is held that a will is merely a declaration of the intentions of the testator with respect to his property to take effect after his death and is not a document securing money or other property within the meaning of section 7 (IV-A) of the Court-fees Act I am therefore, unable to agree with the contention of learned Counsel for the defendants-appellants that "*inter vivos*" will also include transfer by execution of will bequeathing properties to heirs and beneficiaries Mere execution of will bequeathing properties will not and cannot amount to transfer *inter vivos*. It cannot be said to be a transfer by operation of law or act of the party as contemplated in the section No doubt, learned Counsel for the appellants drew my attention to a passage in *Jugalkishore Saraf* v *Raw Cotton Co, Ltd* [3]

"Thus when a person dies testate there is a devolution of his properties to his legal representatives by operation of the law of testamentary succession which is now mainly statutory in this country"

But devolution of properties to his legal representatives will take effect only after his death Learned Counsel cannot, therefore, rely on this passage to support his argument that mere execution of the will is also a transfer by operation of law or by act of parties The learned District Judge is right in his conclusion that the defendants cannot invoke the provisions of sub-section (10) (*ii*) (*a*) of section 9-A as a will does not amount to a transfer *inter vivos* The defendants have been in possession from 25th April, 1927 and therefore the debt has been completely wiped out. The respondents, are therefore entitled to redeem the suit properties without payment of any money,

The second appeal is accordingly dismissed. There will be no order as to costs. No leave

V.K. *Appeal dismissed.*

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1 (1922) 43 M L J 486 I L R 46 Mad 190 a 222

2 (1948) 1 M L J 455

3 (1955) 1 M L J 220 232 (S C) (1955) S C J 371 (1955) 1 S C R 1369

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR M ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M. NATESAN

Messrs Rai Bahadur Shreeram Durga Prasad Private Ltd and others . *Appellants*[1].

v.

The Union of India represented by the Secretary to the Government of India, Ministry of Finance, New Delhi, and others . *Respondents*

Foreign Exchange Regulation Act (VII of 1947), *sections* 12 (1) *and* 23 (a) *and sections* 19 *and* 167 (8) *of Sea Customs Act (VIII of* 1878)—*Export of goods in apparent compliance with section* 12 (1) *of Foreign Exchange Regulation Act—Applicability of sections* 19 *and* 167 (8) *of Sea Customs Act to such cases*

What section 12 (1) of the Foreign Exchange Regulation Act (VII of 1947) does is to enjoin, or to make mandatory, the filing of the declaration by the exporter, and thereby his obtaining a permission to export, any export which avoids this, would be prohibited export Section 12 (2) on the contrary, is primarily intended to enforce the obligation of the exporter, to repatriate the full amount of foreign exchange earned by the goods in the foreign market Where the goods have been under-valued as to the full export value which is the vice of under-invoicing, section 12 (5) reserves a power in the authorities of the Reserve Bank to freeze the shipping documents with the holder thereof, till the Reserve Bank is satisfied that an amount representing the full export value of the goods will be actually realised.

The law imposes not merely prohibition as to import or export, but also imposes restrictions; rstrictions are certainly imposed with regard to export by section 12 (1) of the Foreign Exchange Regulation Act, and the Rules made thereunder. But the idea obviously is to render such goods liable to confiscation where there is an export evading such restrictions, or infringing them. It is very difficult to sustain the interpretation that section 167 (8) of the Sea Customs Act was also intended to appply to a case, where the goods are exported strictly within the ambit of the restriction but the necessary permission had been obtained by inducing the authorities to accept declarations or documents which were false in certain particulars. If the authorities detect this, they will have the power to cancel the permission altogether under section 190 (A) of the Sea Customs Act

The gist of the offence under section 12 (1) of the Foreign Exchange Regulation Act read with sections 19 and 167 (8) of the Sea Customs Act, is an export or attempted export, which is in violation of the obligation of the intending exporter to make a declaration, to furnish documents called for, to satisfy the authorities and to obtain permission to export · Where he has done all this, clearly he has not violated section 12 (1) If he has misled the authorities by false representations, or failed thereby to repatriate foreign exchange, by virtue of his obligation under section 12 (2) those are different offences for which separate and specific penalties can be imposed.

Held that the respondents have really no jurisdiction to proceed further.

Appeals under clause 15 of the Letters Patent against the order of Kailasam, J , dated 1st September, 1966, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 1952 of 1966, etc , presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the respondents therein from taking any action in pursuance or furtherance of the show-cause Memo bearing Ref. No S/21/20/65, dated 17th February, 1965 mentioned in Exhibit A to the affidavit filed in support of the said writ petition issued by the Deputy Collector of Customs, Vishakhapatnam, the third respondent therein

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[1] W A. Nos. 247 to 251 of 1966 20th September, 1967.

R. J. Joshi, S. J. Sorabjee and *A. S. Bobde* (of the Bombay Bar for *K. C. Jacob S K. L Ratan* and *R. Vedantham*), for Appellants.

S. Mohan Kumaramangalam for *G Ramaswami*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, C J.—In *G. Narasingdas Agarawal* v *Union of India*[1], Kailasam, J, dismissed a number of writ petitions, declining to issue writs of prohibition in those cases, restraining the respondents, namely, the Union of India, the Collector of Customs, Madras, and the Deputy Collector of Customs, Vishakhapatnam, from taking further action in pursuance of a large number of show cause memorandum served on the writ appellants. The present appeals are from this judgment, and essentially, they involve the issue whether, under the stated circumstances, the respondent authorities would have jurisdiction to proceed further, in respect of an alleged offence under section 12 (1) read with section 23-A of the Foreign Exchange Regulation Act, 1947, and section 167 (8) of the Sea Customs Act. The matter has been elaborately argued before us, and admittedly, it involves a question of interest and significance The facts have been dealt with by the learned Judge (Kailasam, J) in his judgment, but we propose to refer to them again here, in some detail and also to set forth the several provisions of law involved in their juxtaposition, to enable us to proceed with the discussion of the main issue, of the interpretation of section 12 (1) of the Foreign Exchange Regulation Act

Without dilating further on the background of the facts, which may not be here necessary, it is sufficient for us to state that 62 show cause memoranda were issued by the Deputy Collector of Customs Visakhapatnam, in the following context of events. In connection with certain searches and seizures of gold and silver articles, which do not new concern us, on the 19th and 20th of August, 1963, the authorities came into possession of a number of documents, inclusive of accounts, which are the basis of the averments of infringments. They related to shipping of mineral ores particularly manganese ores , after declarations under section 12 (1) had been filed by the concerned appellants, together with production of the necessary documents, the authorities had been satisfied, *ex facie*, that the papers were in order, and that exports should be permitted, the exports actually occurred, in consequence. The essence of the show cause notices is that, notwithstanding this apparent compliance with the formalities of the law, the appellants really exported manganese ore, or were concerned in the exports in contravention of the restrictions and prohibitions imposed under section 19 of the Sea Customs Act, read with section 12 (1) of the Foreign Exchange Regulation Act, and section 23-*A* of that Act ; that brought into play section 167 (8) of the Sea Customs Act, with the result that all the goods were liable to confiscation under that Act; admittedly, a heavy penal provision. The main question is, whether, in the juxtaposition of the several provisions of law, and in the situation of admission by the authorities that the exports were in apparent compliance with the requirements of the law, there would be jurisdiction to proceed further, because of the alleged suppression of material particulars, with fraudulant motive or the alleged furnishing of details that were deliberately false in the G. R. 1 Form, which led to the authorization of these exports.

Before proceeding further with the relevant provisions of the law, it may be necessary to refer to the form that the arguments took before us. When Mr. Joshi for the appellants, and Mr. Kumaramangalam for the respondent authorities, had submitted certain arguments ; it emerged that the authorities sought to maintain their jurisdiction, as against the prayer for the issue of a writ of prohibition, on the ground that a very elaborate fraud had been practised by the writ appellants with the result that not merely had the value of the exports been under invoiced to a very substantial degree, but also that there had been substantial deprivation to the State, of the benefits of repatriated foreign exchange. The gravamen of this charge was cryptically indicated in the original show cause notice, in paragraph 20, in the following words :

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1. (1967) 1 M L J. 197

"From the foregoing it is disclosed that the financial benefits derived by the shippers, in respect of the subject exports, over and above those revealed to the customs authorities and or other concerned authorities, were not disclosed to the said authorities, and the information about them was deliberately suppressed."

An argument was sought to be built on this, that the fraud rendered the proceedings *non est* and that what section 12 (1) required was a true declaration, that is, not false to the knowledge of the intending exporter, so that the authorities were entitled, even a considerable time later, to treat a false declaration as no compliance with the law at all. The substance of the argument of Mr. Kumaramangalam here was that, while he fully conceded that the declaration under section 12 (1) might be later proved incorrect, as to full export value, under several contingencies, and that the mere error would not detract from the indisputable compliance by the exporter with the law, such protection was not available to an exporter, who makes a deliberately false declaration; fraud vitiates all proceedings, and a permission to export procured through such means, was tantamount to illegal export. We then considered it necessary that the particulars of the fraud should be communicated to the appellants, in sheer fairness, before this argument could even be examined. For this reason, by mutual consent, a supplementary affidavit has been filed on behalf of the respondents, in clarification of the attitude of the Departmental Authorities Before proceeding further, we might dilate upon what the supplementary affidavit purports to disclose, in expansion of the very terse passage in paragraph 20 of the original show cause notice already set forth.

It appears that, from the documents that were seized and that we have earlier referred to, the respondent authorities came to know of, or entertained a belief in the following facts, and scheme of *modus operandi*. With regard to these exports of manganese ores to a foreign country, there was a secret arrangement between the exporters and the foreign buyer, for an extra payment, at specified rates, over and above the rate mentioned in the original contract shown to the Department at the time of exports, and in the invoices, the particulars of which are embodied in the G R. 1 Form This extra payment was deposited, either by the buyer himself or the agent of the exporters, a certain named foreign individual, into the foreign bank account of G N Agarwal or Vittaldas Under this scheme, the goods were undervalued deliberately and :

"the Department was induced to accept their declarations by means of false evidence and fraudulent suppression of facts"

It is alleged that there has been a suppression of an amount of over three crores, and a failure to repatriate the corresponding amount of foreign exchange earned by surreptitious means. This is the basis of the charge that, even though these exports occurred in apparent compliance with section 12 (1), by declarations duly filed, accompanied by the production of required documents, and after permission to export had been obtained from the authorities, all these proceedings were vitiated, for the reason that the declarations were not true, but deliberately false. That being the case, section 167 (8) of the Sea Customs Act was attracted by the vigour of certain provisions, to which we shall immediately refer, and the authorities have a jurisdiction to seize and confiscate the goods, unless due cause is shown for a contrary conclusion. Since an appreciation of the real issue involves the analysis, not merely of the provisions of the Foreign Exchange Regulation Act and the Sea Customs Act, referred to by the learned Judge (Kailasam, J) in his judgment, but also of one or two other provisions, which were not then examined, no apology is necessary for setting forth these provisions in *extenso* here.

The most vital of the provisions, upon the interpretation of which the entire matter may be really said to turn, is section 12 (1) of the Foreign Exchange Regulation Act (Act VII of 1947). It is in the following terms :

"The Central Government may, by notification in the official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification

from India, directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed "manner"

While upon this aspect of the provisions of the several enactments, it is essential to immediately examine section 12 (2) and section 12 (5) of the same Act. We have had occasion to examine the implications of section 12 (2), at very great length, earlier in our judgment in *Venkata Subbu* v *Director of Enforcement*[1]. But we are again setting forth the section here, as the juxtaposition will show the intendment of the Legislature in respect of section 12 (1) as distinguished from section 12 (2). It appears to be clear to us that what section 12 (1) does is to enjoin, or to make mandatory, the filing of the declaration by the exporter, and thereby his obtaining a permission to export, any export which avoids this, would be prohibited export. Section 12 (2) on the contrary, is primarily intended to enforce the obligation of the exporter, to repatriate the full amount of foreign exchange earned by the goods in the foreign market Where the goods have been under valued as to the full export value which is the vice of under invoicing, section 12 (5) reserves a power in the authorities of the Reserve Bank, to freeze the shipping documents with the holder thereof, till the Reserve Bank is satisfied that an amount representing the full export value of the goods will be actually realised Section 12 (2) and section 12 (5) are in the following terms,

"(2) Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that—

(*a*) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(*b*) payment for the goods is made otherwise than in the prescribed manner does not represent the full amount payable by the foreign buyer in respect of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

* * * *

(5) Where in relation to any such goods the value as stated in the invoice is less than the aount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods"

We may immediately proceed to section 22 of the same Act. This is a very important provision, for it directly renders punishable any false application or declaration made to any of the authorities, under the Act; indisputably, it would include the false or fraudulent suppression of material particulars The point of Mr. Kumaramangalam is not that this provision will not apply, or that it may not be brought into play by the requisite authority, who is not the Collector of Customs His point is not even that section 12 (2) of the Act may not apply to the

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1 (1969) 1 M L J 281 (1969) M L J (All) 236 I L.R (1968) 3 Mad 18

facts, for, obviously, the essence of the charge, particularly as disclosed by the supplementary affidavit, is the vice of under invoicing, he concedes that the Director of Enforcement will have full jurisdiction, to proceed to impose the penalties under section 12 (2) if the facts are established But his point is that, on the interpretation of section 12 (1), which ought to prevail, the Collector of Customs has a parallel and independant authority to ask the appellants to show cause, why the goods should not be confiscated under section 167 (8) of the Sea Customs Act.

Section 23 (1) of the Foreign Exchange Regulation Act provides for contravention of the provisions of section 4, section 5, section 9, section 10, sub-section (2) of section 12, section 17, section 18-A or section 18-B or of any rule, direction or order made thereunder ; it is important to note that this provision, which has two sub-clauses (*a*) and (*b*), does not comprise section 12 (1) of the Act. Section 23-A of the same Act is in the following terms

> " Without prejudice to the provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by sub sections (1) and (2) of section 8, sub-section (1) of section 12 and clause (*a*) of sub-section (1) of section 13 shall be deemed to have been imposed under section 11 of the Customs Act., 1962 and all the provisions of that Act shall have effect accordingly "

We might immediately proceed to the Sea Customs Act (VIII of 1878), and its relevant provisions Section 19 of that Act is in the following terms :

> " The Central Government may from time to time by notification in the Official Gazette, prohibit, or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government."

As we have seen earlier, by virtue of section 23-A of the Foreign Exchange Regulation Act, the restrictions under section 12 (1) must be deemed to have been imposed under the Sea Customs Act, and, hence, by virtue of this incorporation by reference, any export in contravention of section 12 (1) will amount to a prohibited export under the Sea Customs Act Section 167 (8) of the Sea Customs Act is set forth as a table in three columns, namely (1) *offences* (2) *section of this Act to which offence has reference* and (3) *penalties* The entire part of the table relating to section 167 (8) may be extracted here :

"(1)	(2)	(3)
8. If any goods, the importation or exporatation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohition or restriction, or if any attempt be made so to import or export any such goods, or if any such goods be found in any package produced to any officer of Customs as containing no such goods, or if any such goods, or any dutiable goods be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India, or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction ·	18 & 19	Such goods shall be liable to confiscation and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees "

While upon this aspect of the inter-dependence of the several provisions of the law, we may note certain provisions that have not been examined by the learned

Judge (Kailasam, J.,) and were, apparently, not brought to his attention. They are of some significance, in the light of the particular argument that we have to examine. One of these provisions is section 167 (72) of the Sea Customs Act, and the columns relating to this item are as follows .

"(1)	(2)	(3)
72 If any person makes or signs or uses, any declaration or document used in the transaction of any business relating to the Customs, knowing such declaration or document to be false in any particular; or counterfeits, falsifies or fraudulently alters or destroys any such document, or any seal, signature, initials or other mark made or impressed by any officer of Customs in the transaction of any business relating to the Customs ; or being required under this Act to produce any document, refuses or neglects to produce such document; or being required under this Act to answer any question put to him by an officer of customs, does not truly answer such question.	General	Such person shal on conviction of any such offence before a Magistrate, be liable to a fine not exceeding One Thousand rupees."

Next, we may note section 190-A of the Sea Customs Act, again not cited before the learned Judge, which deals with the powers of revision of the Chief Customs Authority. It is of some significance, for, on the facts, there can be no doubt that these exports occurred a considerable time prior to the discovery of certain documents, which has sparked off the present proceedings , equally, there can be no doubt that the exports took place in apparent and full compliance with the formalities required by the law, and the rules. We have experienced great difficulty in tracing out what really happened at that time, viz., which particular documents, most probably inclusive of the originals of the contracts with the foreign buyers were produced by the intending exporters, and how the authorities were satisfied that these exports were proper, and should be permitted But there can be no doubt whatever that the exports took place, under the seal and approval of such permission by the Customs Authorities, after scrutiny of the section 12 (1) declarations and other documents ; whether a separate order to that effect was passed, or this was merely effected by affixing the seal to the shipping documents, need not be now laboured upon But, assuming that this was a proceeding permitting the export, and, subsequently, the Customs Authority discovers facts which would show that the permission was obtained by the practice of any fraudulent representation, section 190-A is important, as embodying the power of the Chief Customs Authority to rescind such permission. Under section 190-A (1) proviso, the enactment is clear that the person aggrieved must have a reasonable opportunity to show cause, and under section 190-*A* (3) there is a limitation of two years within which the power could be exercised.

Section 190-A is in the following terms :

"(1) The Chief Customs-Authority may of its own motion or otherwise call for and examine the record of any proceeding in which an Officer of Customs has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may pass such order thereon as it thinks fit:

Provided that no order prejudicial to any person shall be passed under this section unless such person has been given a reasonable opportunity of making a representation against the proposed order.

(2) The powers conferred upon the Chief Customs Authority under sub-section (1) may also, in the like manner and subject to the like conditions, be

exercised by the Chief Customs Officer in respect of any decision or order passed under this Act by any officer of Customs subordinate to him

(3) No decision or order passed by an officer of Customs shall be revised under this section by the Chief Customs-authority or a Chief Customs Officer, as the case may be after the expiry of two years from the date of the decision or order"

As the learned Judge (Kailasam, J) points out, section 27 of the Foreign Exchange Regulation Act, empowers the Central Government to make rules for carrying into effect the provisions of the Act and sub-section 2 (*a*) of section 27, confers specific powers on Government to make rules prescribing forms, and their modes of use This led to the promulgation of the Foreign Exchange Regulation Rules, 1952, which are of some importance. They will be found, together with the forms, in Vakil's *Law Relating to Foreign Exchange* (second edition) at page 239 *et seq.* Under rule 3, the form of the declaration under section 12 (1) is referred to, and the Reserve Bank is authorised to set it out in the first schedule Rule 5 is important, for under sub-clause (2) of rule 5, the Reserve Bank or the Collector of Customs

"may require any exporter to produce, in support of the declaration, such evidence as may be in his possession or power, to satisfy them

* * * * * *

(*ii*) that the invoice value stated in the declaration is the full export value of the goods, and

(*iii*) that the amount representing the full export value of the goods has been or will be paid to the exporter"

The essential form to be filled in by the intending exporter, is admittedly, form G R I (page 242), and the part of it which now concerns us is the following declaration :

"I hereby declare that I am the seller/consignor of the goods in respect of which this declaration is made and that the particulars given above are true and

(*a*) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer.

(*b*) that this is a fair valuation of the goods which are unsold

I/My principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods on or before . "

The main argument can now be clearly exposed to view Mr. Kumaramangalam for the respondents does not deny that the formalities were complied with in the case of the exports in question Section 12 (1) declarations were duly made, they were scrutinised by the authorities, the requisite documents, which probably included the original contracts with the foreign buyers, were called for and examined, and the exports were permitted under the law. How then it is possible to contend that these goods were either exported or attempted to be exported, in violation of the prohibitions or restrictions imposed by law, and are, therefore, liable to be confiscated under section 167 (8) of the Sea Customs Act ? There can be no doubt that the provision is a very stringent and penal one. The learned Judge (Kailasam, J) puts the matter thus at page 200 :

"The punishment under section 167 (8) of the Sea Customs Act is far more severe, in that the goods are liable to be confiscated and the penalty may extend to three times the value of the entire goods, whereas under section 23 (1) (*a*) the penalty can only be three times the value of the foreign exchange in respect of which the contravention has taken place"

As we said earlier, Mr. Kumaramangalam further concedes that section 12 (2) will, in all probability, be applicable to the facts, taking the averments as they are expressed in the affidavit and the supplementary affidavit, equally, section 22 will apply. But according to learned Counsel, these are independent punitive measures,

which have to be initiated by other authorities There is a parallel power in the Collector of Customs to confiscate these goods, on the proper interpretation of section 12 (1) of the Act

When the wording of section 12 (1) is carefully examined, for this purpose, it becomes apparent that, as the substantive section stands, it does not even require the intending exporter to furnish particular figures of the full export value of the goods, declared as such On the contrary, the declaration required, supported by such evidence as may be prescribed, has only to be confined to the undertaking,

"that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner"

But Mr Kumaramangalam contends that it is significant that the words are not, as they conceivably could be, *that the full export value of the goods has been or will be paid*, the Legislature deliberately introduced the expression *the amount representing the full export value,* and that implies that, by the very force of this language, the declaration should include the figures We are not at all clear that such an interpretation flows, as a necessary consequence, from the phraseology of section 12 (1), particularly as this is followed by section 12 (2) which specifically deals with the vice of *under-invoicing*, or furnishing a value below the full export value But the point is really academic, for, as we have seen the rules made, as delegated legislation, apply with equal force, and the G R form is part of the mandatory procedure. That certainly requires the intending exporter to declare the full export value and not merely this, to give an assurance that this is *the same as that contracted with the buyer.* If the present averments are true, that certificate would be a false one, thereby rendering applicable the penal provisions of section 22, and section 12 (2) of the Act. But the real point is, how can the interpretation be sustained, that section 12 (1) itself is infringed, because, though the formalities were complied with, the declaration was not true to the knowledge of the intending exporter? If the Legislature had intended this, as an essential part of this mandatory provision of section 12 (1), one would certainly expect that the requisite words would have been employed, so that the essence of the obligation is not merely to file a declaration, supported by documents, but to file a declaration with no particular that is false to the knowledge of the exporter

Of the various precedents that have been cited before us, the decision of Desai, J, of the Bombay High Court in *Hamad Sultan* v *N G Abrol and another*[1], was noticed by Kailasam, J, also, but it is really not necessary to scrutinise this precedent at any length Actually, Kailasam, J, appears to accept the statement of the law in a vital portion of the judgment, that the offence of the violation of section 22 by making a false statement, was quite distinct from the violation of section 12 (1), and that

"the provisions of section 12 (1) are violated when no declaration is furnished at all, or when the purported declaration is one which cannot be regarded as a declaration within the meaning of section 12 (1) of the Foreign Exchange Regulation Act, 1947"

Kailasam, J, adds at page 203:

"The correctness of this statement standing by itself cannot be questioned"

The Bombay High Court further took the view, which Kailasam, J, was unable to accept, that the provisions of section 12 (1) would be satisfied by the petitioner undertaking to pay in the prescribed manner *the amount representing the full export value of the goods,* and that, incidental to this, if the particulars were falsely furnished, it was not a violation of section 12 (1) Mr. Kumaramangalam would here argue that the question whether section 12 (1) would be violated if an *incorrect* statement is made need not detain us in the present context, he concedes that *under-invoicing* may occur owing to causes beyond the control of intending exporter, it may even be that there is a clerical error, or that subsequent facts establish that more is due from the foreign buyer, to be repatriated as foreign exchange But he claims that

1 Misc Application No 376 of 1957

this kind of extenuation, even if it is permissible will not extend to a deliberately *false* statement or figure, and that such a declaration is no declaration at all It is liable to be treated as *non est.*

It is this distinction that we find it very difficult to accept. The words are not to be found in the section, which would enable such a distinction to be sustained on an *ex facie* interpretation of the section itself Further, it is not as if the Legislature has not provided for the admittedly serious offence of an apparent compliance with the formalities, and the obtaining of permission to export, by deceiving the authorities into accepting documents that are not true, or figures that are not true. Section 22 specifically provides for this, and section 12 (2) equally makes liable the exporter who attempts to get the benefit of an undeclared and un-repatriated foreign exchange, by such means. We must here note that section 167 (8) of the Sea Customs Act obviously refers to sections 18 and 19 of the same Act, as will be clear from the second column Under section 18 there are certain outright prohibitions in respect of categories of goods, such as *counterfeit coin, obscene publications*, etc. The law not merely imposes such prohibition as to import or export, but also imposes restrictions , restrictions are certainly imposed with regard to export by section 12 (1) of the Foreign Exchange Regulation Act, and the rules made thereunder. But the idea obviously is to render such goods liable to confiscation, only where there is an export evading such restrictions, or infringing them It is very difficult to sustain the interpretation that section 167 (8) of the Sea Customs Act was also intended to apply to a case, where the goods are exported strictly within the ambit of the restrictions, but the necessary permission had been obtained by inducing the authorities to accept declarations or documents which were false in certain particulars. We must here point out that, if the authorities detect this, they will have the power to cancel the permission altogether, under section 190-A earlier referred to.

It has been stressed that this interpretation of ours is considerably fortified by the observations in the majority judgment in *East India Commrl Co.* v *Collector of Customs*[1] It is not necessary, here to set forth the facts of that case at any length. But in the judgment of Subba Rao, J , (as he then was), the following statement occurs, which expresses the crux of the matter on the facts as embodied in the *show cause* notice in that case at page 1902 :

> " It was stated in the notice that the special licence was issued on the expres condition that the goods covered by the said licence should be utilised for consumption as raw material or accessories in the factory of the licence holder and that no part thereof should be sold or permitted to be utilised by any other party, that the appellants sold a portion of the goods imported under the said licence to others in breach of the said condition and that, as the appellants infringed the said condition, the goods, or the money substituted in its place, were liable to be confiscated "

The, close parallel is here obvious, for this was also a case where the licence had been obtained by misrepresentation, which was really fraudulent, since the appellants did sell the goods in violation of the undertaking and thus obtained a fraudulent benefit. The Supreme Court observed in a subsequent passage at page 1907 :

> " Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence *non est*, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued under section 3 of the Act so as to bring the case within clause (8) of section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable ; it is good till avoided in the manner prescribed by law . . . In the circumstances, we must hold that when the goods were imported, they were imported, under a valid licence, and therefore it is not possible to say that the goods imported were those prohibited or restricted by or under Ch IV of the Act within the meaning of clause (8) of section 167 of the Sea Customs Act "

1. (1963) 3 S.C.R 338 A I R 1962 S C. 1893

On a parity of reasoning, we are constrained to come to the same conclusion here Mr Kumaramangalam sought to base a distinction between the granted licence in that case which, though obtained by misrepresentation, was voidable at the instance of the authorities, and a declaration under section 12 (1), which *per se*, cannot be cancelled or revoked. The argument is unsustainable Even if the declaration contained false particulars which were not then detected, it was accepted, along with the documents called for from the parties, and whether due to concealment as to the real facts or otherwise, the export was permitted, and it took place under the law Thereafter, we are quite unable to see how the authorities can turn round and say that the export occurred beyond the rigour of the provisions of law, particularly section 12 (1) and hence, that the goods themselves were liable to be confiscated Mr. Kumaramangalam has relied on two reported precedents in customs cases, available in a special publication of such judgments ; but we are unable to see how either helps him

The first of these cases is *Mrs J Essardas* v *Shri A V. Venkateswaran, Collector of Customs*[1], dealt with by Shelat, J in the Bombay High Court The essential fact, in this case, was that the importers were able to import goods beyond the value declared in the bill of entry by means of fraudulent mis-statements and under valuations, and without the cover of a valid licence The question was whether such goods were liable to be confiscated under section 167 (8) of the Sea Customs Act, and the Court held that the goods were liable to be confiscated, as they were, indisputably goods illicitly imported without the cover of a licence. That conclusion, upon the facts of that case, cannot be canvassed here There is an observation of the learned Judge approbating the dictum of De Grey, C J, that fraud vitiates even the most solemn proceedings of the Courts of justice. But as we shall see a little later, that fraud, in order to vitiate the judgment or order, must be extrinsic or collateral to what has been adjudicated upon, and cannot be part of that which was dealt with by the Court The conclusion, on the facts in the case, is that goods of a particular value

"were imported and cleared through the customs without a licence ;"

Once that is established, they were clearly liable to confiscation. The other decision is of the same Court in *Sattanathan* v *Rameschandra & Co.*[2], before Chagla, C.J, and Shah, J. The case involved the fraudulent transfer of a licence, and acts done in pursuance of that, and, on the facts, the Court held that the Collector of Customs had authority, under section 167 (8), to ascertain if the import had been in violation of legal restrictions Further, it had been actually established that the import was illicit.

Upon fraud, which has the consequence of vitiating or rendering *non est* any act of any authority, the position in law is very clear, and settled by the Full Bench decision of this Court in *Kadhirvelu Nainar* v *Kuppuswami Naicker*[3]. This is a very brief judgment of Wallis, C J, following the elaborate exposition earlier given in *Chinnayya* v. *Ramanna*[4]. That precedent refers to the very early English decision of *The Duches of Kingston's case*[5] Even with regard to a declaratory suit, to set aside a prior judgment on the ground of alleged fraud, the fraud to vitiate, must be

"extrinsic or collateral to every thing that has been adjudicated upon, but not one that has been or must be deemed to have been dealt with by the Court."

In approbating this principle, the learned Judges observed that, indubitably, it was highly improper or immoral on the part of parties to let in false evidence or to practise deceit on the Court, in any form. But that is a matter for consideration, which is intrinsic to the case, and, however erroneous or patent be the fraudulent representations, such an adjudication would be *res judicata* between the parties. Mr. Joshi for the appellants has drawn our attention to the decision of the Judicial

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1. Misc. Application Nos. 132, 133 to 141, 184 of 1958.
2. Misc Application No. 99 of 1954.
3. (1918) 34 M L J 590 : I L R 41 Mad. 743 (F B)
4. 25 M L J 228 : (1913) I L R. 38 Mad. 203
5. (1776) 2 Sm L.C. 731, 11th Edn.

Committee in *Malik Damsaz Khan* v *Commissioner of Income-tax, Punjab*[1], which is certainly helpful in the present case. It was the assessee in that case, who contended that the return of income rendered by him was not a return within the meaning of section 22 (2) of the Act, and hence that it must be deemed to be *non est* The Income-tax Officer could, thereafter, assess only under section 23 (4) of the Act and not under section 23 (3) Their Lordships observed at page 558 :

"Neither in the incompleteness of the return nor in the fact that in an accompanying statement the appellant referred to his return as an estimate can their Lordships find any possible justification for the plea that the assessment was incompetent or that the Appellate Assistant Commissioner had no jurisdiction to entertain the appeal proceedings which the appellant himself initiated."

Mr. Kumaramangalam has relied on In re, *Abhey Ram Chunni Lal*[2], in which the learned Judges of the Division Bench held that, if the return of the assessee was *bona fide* section 23 (2) would apply. But that provision would not apply to a case, where the assessee deliberately failed to comply with the rule We do not think it is necessary to proceed into this aspect, or the prior precedents in this judgment. The reason is that the question is not whether one provision, or another of a statute applies or does not, to a return which may be incorrect but is not deliberately false, as distinguished from a return which is deliberately false. The real point here is that the gist of the offence under section 12 (1) of the Foreign Exchange Regulation Act read with sections 19 and 167 (8) of the Sea Customs Act, is an export or attempted export, which is in violation of the obligation of the intending exporter to make a declaration, to furnish documents called for, to satisfy the authorities, and to obtain permission to export Where he has done all this, clearly he has not violated section 12 (1). If he has misled the authorities by false representations, or failed thereby to repatriate foreign exchange, by virtue of his obligation under section 12 (2) those are different offences, for which separate and specific penalties can be imposed. The fact that the penalty that can be imposed, upon proof of such offences, may not be as heavy in the monetary sense, as that involved in confiscation under section 167 (8) of the Sea Customs Act, appears to us to be quite irrelevant , for that matter a criminal prosecution, and the consequent and possible imprisonment, may be far heavier punishment to be visited on a wrong-doer

It follows that the respondents have really no jurisdiction to proceed further in this matter The law relating to the issue of a writ of prohibition need not be discussed here, for the principles are well-settled. That writ does not issue at the instance of a party, where a jurisdiction can conceivably arise, on the averments and information before the quasi-judicial authority , but where it cannot arise, the writ has to issue, in the interests of justice. Accordingly, we allow these appeals and direct the issue of writs of prohibition in these cases. There will be no order of costs.

S.V.J. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R SADASIVAM.

Saleha Bi and others .. *Appellants**

v.

M/s. A Hajee Abdul Rahim Saheb & Co., and others .. *Respondents.*

Principal and agent—Accounts—Stated or settled accounts—Liability of agent to account—Mere submission of set of written accounts—Not sufficient—Explanation with vouchers necessary—Acceptance of accounts—May be express or implied by conduct—Suit for accounts—Preliminary decree—When to be passed—Practice

Contract Act (IV of 1872), section 213.

When the relationship of agency was established, the determination of the actual liability in any particular amount should be as a result of an order to take

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1. L R 74 I A. 98 · (1947) 2 M.L.J. 556 (P C.)
2. A I R 1933 All 197.

* Appeal Nos 189 and 500 of 1962 4th September, 1967.

an account, that is to say, a preliminary decree would be the proper one to pass in a suit for accounts But it would be different if the case of the agent was that an account had already been furnished and accepted.

An agent is not discharged from his duty to render an account merely by the submission of a set of written accounts His duty also consists in explaining them wherever necessary and in producing vouchers and the like in respect of any expenditure that may have been incurred for and on behalf of the principals. Though, no doubt, this part of the duty cannot be avoided, it would still be a question of fact in each case whether the accounts submitted are not self-explanatory or at least whether, in the absence of any demand for an explanation, one can still say that the agent's duty has not been discharged

The right to claim accounts from an agent, as recognized in section 213 of the Contract Act is subject to the qualification that the accounts between the agent and principal are settled or stated The acceptance of the accounts may be express or implied from conduct

Where the principal never took any objection to the accounts submitted by the agent from time to time, but went further and incorporated the effect of those accounts into their own accounts, the conclusion would be that the accounts are settled or stated

Appeals respectively against the Decree of the City Civil Court (Third Assistant Judge) in O S Nos. 1905 of 1957 and O S. No 1867 of 1958 respectively.

M/s Rao and *Menon* and *P V. Chalapati Rao*, for Appellant

G Ramakrishna Iyer, P P Selvarajan, S Abdul Salam, M R. Krishnan and *S M Amjad Nainar* and *P S Selvarajan*, for Respondents.

The Judgment of the Court was delivered by

Srinivasan, J—M/s Quaium and Company, by its partners, laid a suit against M/s. Haji Abdul Rahim Saheb and Company, by its partners, for accounts The latter company sued the former and sought to recover a certain sum as due to them as per the accounts in respect of the business conducted as between them In what follows, M/s Quaium and Company will be referred to as the principals and M/s Haji Abdul Rahim Saheb and Company as the agents. The principals carry on the business of tanning in Mel Visharam, North Arcot district and the agents are engaged in doing commission business at Madras, selling the tanned hides of the principals as also of other tanners. A broad statement of the opposing contentions would suffice for dealing with the points raised in these appeals It is not in dispute that the agents were selling goods of the principals during the period June, 1954 to July, 1957 It was alleged by the principals that the agreed commission was 2 per cent of the realisations, besides such customary allowances incidental to the trade. It was further claimed that the agents undertook to assort the goods of the principals and after intimation to the principals sell the goods as the goods of the principals and also to submit a true account of each sale so effected. The principals alleged that the monthly statements received from the agents were defective in material particulars, but it was not till July, 1957, that any suspicion arose Thereafter, they stopped the despatch of further goods to the agents and the agency was terminated The principals claim that they looked into the accounts of the agents during the period of one year August, 1956 to July, 1957, and they purport to have realised thereby that the agents had misconducted themselves throughout the period of the agency. It was stated that the agents converted the goods consigned to them as their own and were selling them on their own account without the buyers being acquainted with the source of the goods or the principals being informed of the identity of the buyers and other material circumstances connected with the sales. It was claimed by the principals in their suit that contrary to the agreement, the agents were debiting commission at the rate of 2½ per cent. It was further alleged that there was a difference in the weight of the goods despatched to the agents and the weight acknowledged by them For these reasons, they contended that the agents were liable to render a true and proper account for the period in question.

The defence by the agents was that they were not constituted as the agents for the principals. The arrangements was only that the principals consigned their goods to the agents for sale in Madras and the United Kingdom. The principals were invariably taking moneys in advance far in excess of the value of the goods supplied Though the original agreement was that the commission was to be 2 per cent, in view of the large sums of the agents locked up with the principals, the rate of commission was raised to 2½ per cent from January, 1955 onwards. The agents also stated that the practice in this line of trade was not to sell the goods of any particular person as the goods of that person In order to get the best price, the goods were assorted into recognised grades or qualities and tanned hides of a particular grade or quality belonging to several constituents of the commission agents were sold in one or more lots as was convenient or possible. This practice which obtains in the trade, according to the agents, served the best interests of the tanners themselves The agents further claimed that they had been submitting monthly statements during this entire period of three years and to no statement was any objection taken at any point of time They were not called upon to submit any explanation with regard to the statements of accounts. They denied the alleged conversion of the goods They stated that one or more of the partners of the principals were present on every occasion when the goods were assorted and sold in lots along with other goods of like quality The shortgage in weight put forward by the principals was also denied.

This suit by the principals was dismissed, the learned III Assistant Judge of the City Civil Court holding against the principals on all the issues raised by the above contentions He expressed himself categorically by stating that agents had rendered proper accounts to the principals and that the principals had not succeeded in surcharging and falsifying the accounts of the agents He also stated that the pleadings of the principals were "wholly fictitious and dishonest" and were clearly meant to "harass the agents."

Practically simultaneously with the suit filed by the principles, the agents themselves filed a suit, O S No 1867 of 1958 In that suit, the claim was made that according to the accounts which had been submitted by the agents periodically and not objected to by the principals a sum of Rs 17,956-8-5 was due to them from the principals The defence to this action was virtually what the principals put forward as the basis of their claim to accounting in the earlier suit. The trial Judge found in favour of the agents and granted a decree against the principals.

The two appeals are accordingly by the principals In one, objection is taken to the dismissal of the action, it being broadly contended that the Court, after a decision on the questions affecting the liability to account, should have passed a preliminary decree for accounts and left the other matters relating to the ascertainment of the liability in terms of money to be determined on an examination of the accounts; and in the other, the same contention was presented in a different form *viz*, that in the absence of an account properly rendered by the agents, there can be no decree in their favour for any specific amount.

Mr Chalapathi Rao, learned Counsel for the principals-appellants, put forward three grounds as justifying the claim of the principals to a decree for accounting. According to him, the rate of commission originally agreed to has been unauthorisedly enhanced by the agents and the monthly statements of accounts submitted by the agents did not disclose the rate at which the commision had been deducted. The principals could not, on a cursory glance of these statements, become aware that the rate of commision charged was higher than what was originally agreed to. This itself, according to Mr Chalapathi Rao, is sufficient to show that the accounts submitted were not true and certainly had not been accepted by the principals. Secondly, it was argued that the principals' goods had been unauthorisedly mixed up with the goods of other customers and had not been sold as the principals' goods, which was the understanding between the parties. If, therefore, the agents had committed a breach of the terms of the agreement with regard to the mode of sale,

the effect of such a breach could be determined only on an examination of the accounts by the Court on the appointment of a Commissioner. Thirdly, it was urged that the customary charges debited against the principals are not sanctioned by the agreement between the parties But, we may state here itself that this ground was given up in the course of the arguments The contention thus is that the Court should have passed a preliminary decree and left the determination of the liability of the one against the other to final decree proceedings

The principal question that we propose to address ourselves to is whether the agents had rendered an account periodically within the scope of their liability under section 213 of the Indian Contract Act. This in turn involves an examination of the two contentions outlined by Mr. Chalapathi Rao, *viz.*, that the commission had been improperly enhanced without any notice to the principals, and secondly, that the mode of sale of the principals' goods was contrary to what was agreed upon.

Mr Chalapathi Rao contended that the first partner of the principal firm was the one who provided the capital and that the other two persons, who are the second and third plaintiffs in O S No 1905 of 1957, are related to the partners and employees in the agency firm The second plaintiff is said to be the father-in-law of one of the partners of the agency firm, while third plaintiff is the father-in-law of the cashier of the agency firm, who gave evidence as D W 1 It was claimed that the first plaintiff, who is now dead, was residing nearabouts Nagpur and was an absente partner, so that the business at Mel Visharam of the principal firm was conducted by the second and third plaintiffs He virtually charged these two partners with having colluded with the members of the agency firm in defrauding the first plaintiff We may at once say that this charge was wholly unsubstantiated It would appear that early in January, 1957, the first plaintiff of the principal firm executed a power-of-attorney in favour of his brother, who was examined as P W 1. This power, which is Exhibit A-372, authorized P W 1 to take the first plaintiff's place in so far as the principal firm's business was concerned It appears that as the first plaintiff had fallen ill, he thought it necessary to send his brother down south to look after the business. It was suggested that this was done because the first plaintiff was not satisfied with the conduct of the business, particularly with the agents Except for the execution of this power, there is really nothing in the evidence which supports the claim that at that point of time any suspicion was entertained by the deceased Quaium Saheb, the first plaintiff What P W 1 stated was merely that as the tannery business was showing losses, he was sent by his brother to find out where the mischief lay His evidence does not show that there was any suspicion as against the conduct of the other two partners of the principal firm In fact, he stated that the other partners helped him by looking through the accounts of the agents. The large statement made by Mr. Chalapathi Rao at the opening that the second and third plaintiffs were colluding with the agents or that any suspicion was felt in that regard is not borne out by the evidence of P. W 1 himself P W 1 who does not know Tamil, attempted to obtain a picture of the transactions with the agents and claims to have asked for and obtained the examination of the accounts maintained by the agents from January, 1956 onwards. and he pretends to have noticed some differences. There is no letter proceeding from the first plaintiff in which any objection to the monthly statements or to the claims of the agents was ever taken P W. 1's version that accounts were not settled or that the agents claimed an excess commission of 2½% or that they took the goods as sold to themselves and were not giving an equal distribution of the price obtained are all matters about which he has no personal knowledge whatsoever. He has admitted, however, that his deceased brother, the first plaintiff, was visiting Madras between 1954 and 1957. P W 1 is himself a resident of Kanpur and carries on a business there. He could not even say when his brother Quaium fell ill and was unable to attend to his affairs personally He admitted that the other two partners, that is, plaintiffs 2 and 3, were explaining the accounts to him. He admitted also that he himself inspected the assortment

of the goods in the months immediately preceding the termination of the agency, but did not claim that the assortment was made improperly It would suffice to say that P W 1 has no personal knowledge of any of the incidents relating to the agreement between the principals and the agents and his evidence hardly serves to advance the contentions of the principals

Mr. Chalapathi Rao claims that certain admissions have been made by D. W 1, who was examined on behalf of the agents, which establish the principal's contentions D W. 1 is a cashier of the agency firm As stated already, the third plaintiff partner of the principal's firm is his father-in-law It would suffice to scrutinise his evidence only in so far as the two points we have set out above are concerned, namely, the dispute regarding the commission and that regarding the assortment and the sale of goods. Before we examine his evidence, we may refer to one admitted feature. Right from June, 1954, down to August, 1957, the principals have been in receipt of two sets of statements furnished by the agents, month after month One set of statements is what is called 'Jodip' statement This statement, it is admitted on both sides, is a statement which explains the manner in which the goods consigned by the principals to the agents are assorted into various grades, such as second, third, fourth, fifth and rejects The other set of statements are what are called 'Dab' statements They have been furnished by the agents at the end of every month These statements deal with the entirety of the transactions during the month, how the various grades of assorted goods belonging to the principals were sold and for what value. Taking one statement, that relating to December, 1955, marked as Exhibit A-182, it shows that during the month, goods were sold to the value of Rs 48,776-7-3 Debiting certain expenses, the balance to the credit of the principals is shown as Rs. 47,090-0-9. Then follows a statement of the various amounts paid on behalf of the principals and various expenses incurred on behalf of the principals, and the total works out to Rs 68,561-1-10 The result of the transactions is shown at the end as balance in favour of the agents, that it is to say, that the plaintiffs were liable to pay the difference to the agents. It appears accordingly that month after month, a statement of this kind clearly indicating the liability of the principals to the agents in a particular sum as arrived at, as a result of the month's trasactions was being forwarded to the principals and it is virtually conceded that at no point of time was there any objection taken to these statements.

In so far as the 'Jodip' statements, that is, the statements furnishing particulars of the assortment of the goods and informing the principals that the goods consigned by them in one lot consisted of so many items of this or that variety, are concerned, they are not challenged, and Mr. Chalapathi Rao concedes that there is no dispute on the point. What we have to assess now is how far, despite the fact that these monthly statements were being rendered and passed unquestioned by the principals, the claim is tenable that there was no settlement of account and that the principals are now entitled to ask for a decree for an account.

We entirely agree with the proposition that an agent is not discharged from his duty to render an account merely by the submission of a set of written accounts. His duty also consists in explaining them wherever necessary and in producing vouchers and the like in respect of any expenditure that may have been incurred for and on behalf of the principals Though, no doubt, this part of the duty cannot be avoided, it would still be a question of fact in each case whether the accounts submitted are not self-explanatory or at least whether, in the absence of any demand for an explanation, one can still say that the agents' duty has not been discharged. Mr Chalapathi Rao referred to the decision of the Privy Council in *Harinath Roy v Krishnakumar Bhakshi*[1] That was a case where the Judicial Committee laid it down that where the pleadings established that the suit was essentially one for account, the regular course is to order an account to be taken of the defendants' dealings with the plaintiffs' money. The Judicial Committee, however, expressed

1 (1887) I L R. 14 Cal 147

no opinion whether in a suit for an account an issue could not be raised even at the outset so clearly as to be ready for decision, that is to say, whether a decree in the nature of a final decree could not be made even at that stage That was a case, however, where a person employed as a Dewan for the purpose of drawing and expending the money of the principal was sued for accounts, the principal alleging that more had been drawn than was expended and that a specific sum had been misappropriated by the agent The agent denied any kind of accountability and it was found that the relationship of agency existed The appellate Court dismissed the suit on the ground that it was impossible to decide at the hearing how much of the principal's money was unaccounted for, though an attempt was made to prove the balance due It is this method of disposal of a suit for accounts that the Judicial Committee deprecated They pointed out that when the relationship of agency was established, the determination of the actual liability in any particular amount should be as a result of an order to take an account, that is to say, the preliminary decree would be the proper one to pass in such a suit. This decision is certainly not of much help, for an agent may well take the ground that an account had already been furnished and accepted, which is precisely the ground taken in this case *Madhusudan Sen* v *Rakhlalchandradas Basak*[1], lays down that the duty of an agent does not end by merely submitting the papers when accounts are demanded, and that a failure to explain them when called upon to do so will amount to a refusal The learned Judges observe at page 259

> "Finally, we have to deal with the question of the mode in which accounts should be rendered On behalf of the defendant, the position has been maintained that as soon as the defendant, as the agent of the plaintiffs submitted his account papers, his duty was discharged and that the plaintiffs are under no obligation to examine these papers without his assistance We are unable to agree in the view put forward on behalf of the appellant The duty of an agent when he is called upon to render accounts to his principal was explained by the Judicial Committee in the case of *Harinath Roy* v *Krishnakumar Bhakshi*[2] This principle has been recognised in a long series of cases"

Karuppiah Pillai v *Pichiah Pillai*[3], does not advance the appellants' arguments It appears that a suit for accounts was dismissed solely for the reason that the account-books which had been submitted by the agent to his principals were not produced by the principals, who were withholding them The learned Judge held that that would not suffice to discharge the liability to account, and when once, the agency relationship was proved and it was not shown that the accounts had been settled, the proper course was to pass a preliminary decree for the taking of accounts

We shall now proceed to examine the evidence with regard to the two matters we have set out earlier As we have already said, on the side of the principals plaintiffs, there is no evidence to establish what the precise tems of the agreement between the principals and agents were There is no written document evidencing such an agreement Normally, in the absence of any oral testimony on this head, the Court would be justified in looking into the conduct of the parties in ascertaining the true scope and nature of the agreement If we do so and if we take the fact that voluminous sets of accounts had been submitted by the agents at the end of each month, which statements were not questioned on any ground whatsoever, one may justifiably presume that the parties agreed to such terms as those statements would indicate It is not easy to accept the claim made by the principals that they never looked into the accounts or that they merely kept them by. On the other hand, it is admitted that these accounts were virtually adopted and passed into the principals' own accounts without any item being kept in suspense as under question or as liable to an explanation from the agents It is true the agent's duty is not discharged by merely submitting some written accounts, there is the further duty upon him to attend and explain any matter in controversy But, where no matter

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1 (1916) I L R 43 Cal 248
2. (1887) I L R 14 Cal 147.
3 (1958) 1 M L J 396

appears to have been in controversy, we fail to see how merely by the principal not signifying anything with regard to the account submitted, this additional duty can be deemed to be still hanging over the head of the agent for an unconscionable length of time It is noteworthy that it was not merely statement of the sales of the goods of the principals that was submitted Several large amounts unconnected with the sales of the goods had been disbursed on behalf of and on account of the principals, which sums had been debited against the principals in those accounts. When, in acknowledging the liability for a certain sum as due to the principals by the sale of the principals goods, the agent debits the principals with the charges relating to certain transactions carried out on their behalf, the view might very properly be taken that at the end of each month, there was a stated account which in the absence of any objection from the principals must be demed to have been accepted by them The fact that the recurring debit or credit, as the case may be, was carried on from month to month, would not by itself be sufficient to counter such a conclusion.

It was argued on behalf of the principals that the plea with regard to the rate of commission has been inconsistent In the written statement of the agents, in the suit filed by the principals, it was claimed that the commission was at 2 per cent up will December, 1954, and 2½ per cent. from January, 1955, on what words, while, in the suit filed by the agents for recovery of an ascertained amount, it was said that the agreement was that the commission was to be 2½ per cent We do not think that this discrepancy, as it is called, is of any great moment It is a fact that in the monthly accounts between June and December, 1954, the commission was deducted at 2 per cent and in all the subsequent months from January, 1955, onwards, it was deducted at 2½ per cent The fact that in the account statement the percentage was not specified is of no consequence either The explanation for the alteration in the rate was given by D. W 1 in his evidence D W 1 claimed to have been present when the agency agreement was entered into It appears that prior to his employment in the agents' firm, he was more or less an apprentice learning the business and doing part-time work in the agency firm As we said, he is also related to one of the partners of the principals firm It was not unlikely that he was present when the agreement was come to He stated in his evidence that the commission originally agreed upon was 2 per cent on sales It was also agreed that the agents should advance whatever amounts the principals required in respect of the goods consigned and that such advance were to be interest-free He stated that a large number of merchants do business on such terms, but as the principals started to take heavier advances, the agents stipulated for a higher commission of 2½ per cent and that all the three partners agreed thereto. Though the learned trial Judge did not look favourably upon his evidence, we see no reason to reject it, principally because no cross-examination was directed in respect of this part of the evidence of D. W. 1 We are accordingly satisfied that there was no unauthorised variation of the rate of commission When to the knowledge of the principals commission was being deducted at 2½% every month over a period of two and a half years, it can hardly be maintained that there was a dispute at any point of time in this connection

Though the learned Counsel for the principals appellants conceded even at the outset that there was no dispute regarding the assortment of the goods into various grades, he however argued that the manner in which the goods of the principals were sold was contrary to the understanding between the parties As we have already stated, there is no written agreement or any correspondence which would reveal the terms of the agreement between the parties It is also manifest from the 'Dab' statement that were submitted by the agents that the goods of the principals were sold as consisting of various qualities or grades We have already referred to the evidence of D W 1 that both on the occasion of the assortment and on later occasions of sale, the partners of the principals' firm were present on several occasions. They should accordingly have been fully aware of the fact that the goods of the principals were not sold separately from the rest of the goods handled by the agents Even P W 1 stated that when he made the enquiries in the market, he was told that

some people mix the goods and some others do not mix He asserted that without the instructions of the principals, the goods of the principals could not be mixed with those of the others. He specifically claimed that he had written letters to the agents objecting to the mixing, but these letters were apparently written on 1st of August, 1957, practically during the last week before the agency was terminated. From his own statement, therefore, it is clear that no objection had been taken on earlier occasions to the mixing of the principals' goods with those of other tanners. P. W. 1 himself is a dealer in hides and skins and he was dealing with one Obiedulla and Company as their agents. He admitted that those agents were consigning him assortment statements and 'Dab' statements "giving full particulars" He did not however produce those statements in order to make out his claim that selling agents do not generally mix the goods with those of others. He does not claim, it must be stated, any extensive knowledge of the mode in which transactions in hides and skins are conducted locally

Turning now to the evidence of D W 1, he asserted that when the three partners of the principals firm came to the agents firm and settled the terms of the agency, the instructions were that the principals would consign their goods, which on receipt would be assorted into a seconds, thirds, fourths, fifths and rejects There were no firsts Assortments 2 to 5 are called lots and are based upon the quality of the goods As soon as the assortments were made, assortment slips were sent to the principals The goods would be sold locally Rejections, which appear to be the most inferior sort, would sometimes be sent to the foreign market After sales, the principals would be informed about the sales of their lots and the monthly 'Dab' statement showing the assortment charges, cartage, dharmam, weighing cooly, lorry freight and other commissions would be furnished to the principals. He gave particulars of the various charges on these heads According to him, it was agreed that whatever amounts were required by the principals would be paid to them in respect of the goods consigned, obviously even in advance of the sales He swore definitely that a large number of merchants do business on these terms of agency and the principals agreed to these terms, as they were also fully aware of the usual terms prevailing in the market He further stated that exporters would usually purchase the goods in bulk consisting of 1,000 or more pieces from the seconds to fifths Goods received from the tanners would have to be disposed of early, as they would change colour if kept too long He stated that goods from all customers would be collected for a period of over 4 or 5 days and when the total reached about 1,500 pieces, lots would be made according to the variety. The weight of the lots belonging to each principal would be noted so as to facilitate apportionment of the sale price received A certain per centage is allowed in the weight in order to meet the shortage due to dryage.

That this is the mode of doing business in this line of trade was also spoken to by D W 2, who has been doing business in hides and skins In aswer to a specific question as to how this commission business was being done by the firms generally, he stated .

"Tanners send goods to commission mundies. They would receive advance from the mundi The mundi will charge 2 per cent. commission If the tanners have been taking advance in excess of the value of the goods sent, mundi will charge 2½ per cent commission. The goods would be assorted into seconds to fifths, then rejects . They arrange to sell it to exporters. The mundi will inform the tanners about the assortment even before the sale Mundi will charge *thiruppam, dharmam,* assortment charges .Some tanners will send about 500 pieces, some about 1,000 pieces and so on In most of the mundies, they mix goods of different tanners and sell them In some mundies, they sell without mixing In the case of mixing, the price will be distributed among the tanners. The sale will be notified to the tanners . . . The purchasers will check the assortments and reassort them If the assortment is inferior, the price would be less"

No cross-examination was directed on this aspect of the evidence of this witness, who spoke to the general features of the trade. The witness, however, could not say in what circumstances goods will be mixed up and in what circumstances they will be sold separately. He stated however in cross-examination that the commission mundi would sell separately if there were over 100 pieces, possibly of one variety.

It appears from the evidence of both D Ws 1 and 2, therefore, that the normal method of carrying on business by these commission agents is to assort the goods of any customer into various categories and inform the customer immediately of the position. Thereafter, when it comes to sales, they sell various lots of the categories of goods, irrespective of to whom the goods belong Goods of the same variety and of similar quality would be mixed up and sold in one lot. It is easy to conceive that a business in this line of goods cannot be done in any other manner, for if a tanner sends a lot consisting of say 100 pieces, in which there are perhaps a dozen skins of one variety, the sale of only this dozen skins is hardly likely to interest the purchasers, who mostly work for the exporters and for the foreign market and prefer to buy goods in bulk. That has been brought out clearly in the evidence of D W. 1. It is true that D W. 1 admitted that if there are specific instructions to the contrary where a principal directs the sale of his goods separately, the commission agents would be bound to follow such instructions In the absence of such specific instructions, the customary practice in the trade would be followed If any one thing is made clear in the whole of the evidence, it is that there were no such specific instructions proceeding from the principals. Mr Chalapathi Rao purported to rely upon one sentence in the evidence of D W. 1, wherein D.W. 1 stated · "The plaintiffs have been sending always primes and best tanners It is called Bangalore quality" From this, he sought to deduce that the goods produced by the principals were o such excellence that they could be sold without any assortment and separately without being mixed with other goods. What the witness meant is however brought out in the preceding and the following sentences in his evidence He stated, "Prime tannage is the highest quality of tannage. Best tannage is next to prime. Coastal tannage is done in coastal districts, which are generally inferior. That is done only in Andhra. Plaintiffs have been sending always prime and best tanners It is called Bangalore quality." What the witness was speaking to in this connection appears to have reference to the various methods of tanning employed in different areas and not to the grades into which the goods are subsequently classified. Whatever that might be, it appears to us that in the absence of proof that any specific instructions were given by the principals with regard to the mode of selling their goods, the agents were fully entitled to follow the customary practice in the trade

After disputes arose between the parties, some letters passed between them Apparently, after the principals stopped sending goods to the agents, the latter complained, and in reply P W. 1 wrote Exhibit B-51 on 31st July, 1957. In this he stated ·

> "Your complaint that goods are not sent to you but to others is correct. But we have noted that no some little difference but a great gulf yawns between your mundi's assortment and sales and those of others The extent of loss we have sustained by sending goods to your mundy could be guaged by us only on looking into the sales effected to others .. ... First and foremost, we want to have particulars of our goods sold by you Please furnish us particulars supported by bills as to which all parties our goods have been sold to from January, 1956, onwards upto date so that we may understand the position. Until then, we do not deem it feasible to pack more goods to your mundi........ "

This appears to be the first letter wherein a specific complaint was made to the agents against the assortment of the goods and the sales We have already referred to the fact that the complaint with regard to the assortment, which was taken in the pleadings, has now been given up This was followed by another letter, Exhibit B-52, dated 1st August, 1957, in which the same demand as in the earlier letter is reiterated.

In reply, the agents wrote Exhibit A-369, dated 2nd August, 1957. Portions of this letter are of some importance and are extracted below. The agents say here :

"You have asked us to furnish particulars as to who are the parties to whom goods are sold since 1956 Your question is most improper because the goods that were being sent to us for a very long period used to be goods not very well tanned There would be a shortage of seconds These goods by themselves alone would not be purchased by anybody. If they are to be sold alone separately they could be sold at a lesser price in terms of annas only In case sales were effected at these rates, the work of your shop will suffer seriously and great loss would result thereby With a view to benefit you, we have been mixing up your goods with better quality goods that were being received by us from other customers and selling them with a view to secure a better price for you It is only after P W 1's return from Kanpur that the work of your shop has been set right by him to a certain extent Notwithstanding this, your goods are still of a somewhat inferior quality compared to those of other customers P W 1 would visit Madras every week and would keenly observe your goods as well as the goods of other customers and understand the difference We have been apprising you of every particular in detail every time he visits us Besides, from the commencement of our business, to this date, we have been mixing up the goods received from all customers and selling them at a price in accordance with weight and in due consideration of seconds . . Prior to P W 1's coming, your company people would invariably visit Madras There was not the slightest objection to our sales then Even after P W' 1's arrival, we have been doing our business as usual as per our mamool Even he did not raise any objection . ... Because your goods could not be sold by themselves alone, we are helpless in being unable to furnish accounts to you.. . "

In this letter, there is a categorical statement that the mnaner in which the principals' goods were being sold did not vary from the practice that was being followed, a practice which was well within the knowledge of the principals and had not been objected to by them In the last sentence of the above extract, what the agents say is that they were unable to give particulars of the persons to whom the principals' goods were sold, for the principals' goods had been mixed up and sold in circumstances stated earlier Mr Chalapathi Rao's arguments, which seeks to take this statement out of context and interpret it to mean that the agents had not rendered any account and confessed their inability to furnish any accounts cannot be accepted.

To restate the factual position, the agents had been submitting 'Jodip' statements immediately on the receipt of the goods from the principals These 'Jodip' statements acknowledged the receipt of so much weight of the goods and showed also the various grades into which the goods had been classified This assortment was not and is not now objected to The agents would thereafter consolidate the goods of the same variety belonging to their several customers and sell them in one lot The custom in the trade has sanctioned this practice Moreover, since the skins are exported almost entirely for the foreign market, the sales are effected in bulk and not in small quantities of a few pieces There was no direction proceeding from the principals to deal with their goods in any other way At the end of each month the agents submitted accounts to the principals These accounts not only showed the realisations on account of the sales of the goods of the principals, but also debited the principals with various amounts which the agents had expended for and on behalf of the principals, sums which ran into tens of thousands At the end of each month, therefore, the 'Dab' statements clearly showed that the principals were liable to pay so much amount to the agents, or the agents were liable to pay so much amount to the principals, depending upon whether the balance was adverse to or in favour of the principals It is admitted again that the result of these statements was taken over into the principals' own accounts without any reservation When the business has gone on, in this manner for a period of three years, without any detail of these transactions being questioned and without any objection taket to the statement of the liability of the principals in even one of these statements, the question arises how far we can still say that solely for the reason that the relationship

of agency existed, the agents should now render an account, or whether in this state of things, one cannot reasonably conclude that accounts had been rendered and accepted by the principals from time to time

In a decision of the Bombay High Court in *Maneklal* v *Jhwala Dutt*[1], Chagla, J. dealt with this question He referred to section 213 of the Contract Act and observed:

> " Now, every principal has a right, which has received the statutory recognition in section 213, Contract Act, to claim accounts from his agent, and section 213, says that an agent is bound to render proper accounts to his principal on demand. But it is clear that this right to claim accounts is subject to one qualification and that qualification is that the accounts between the principals and the agent are settled or stated Just as accounts between a principal and principal can be stated or settled, equally so, they can be stated or settled between a principal and an agent "

Proceeding further

> " Now, what are stated or settled accounts ? If accounts are submitted and if they are accepted as correct by the other side to whom the accounts have been rendered, then in law you have stated or settled accounts It is not necessary that the statement of accounts need be in writing, nor is it necessary that parties should sit down, compare the accounts and call for vouchers, etc All that the Court has got to ascertain is whether in fact the party to whom accounts were rendered has accepted those accounts as corrrect The acceptance need not be express It can be inferred from conduct .... "

And the learned Judge proceeded to deal with certain decisions Referring to *Willis* v *Jeernigan*[2], he pointed out that in that decision, the Lord Chancellor, who was dealing with a similar question, observed that there was no absolute necessity that the accounts should be signed by the parties who had mutual dealings to make it a stated account, for even where there were transactions, suppose between a merchant in England and a merchant beyond the sea, and an account transmitted to England from the person who was abroad, it was not the signing which would make it a stated account but the person to whom it was sent keeping it by him for a length of time without making any objection which should bind him and prevent his entering into an open account afterwards The learned Judge also referred to another English case, where the view was taken that it was the rule of the Court that where a merchant kept an account by him for about two years without objection, the Court would consider that the accounts were settled or stated The principle of these decisions seems to have been followed by the Bombay High Court in certain other cases to which it is not necessary to refer In the present case, both for the reason that the principals never took any objection to the accounts submitted by the agents from time to time, but went further and incorporated the effect of these accounts into their own accounts, the conclusion seems to be irresistible that it was regarded by both parties as a stated or settled account at the end of each month We are unable to agree with Mr Chalapathi Rao that the observations of Chagla, J. in the above case are very wide No decision has been cited before us wherein the principles upon which it has to be determined whether accounts have been stated or settled have been differently expressed

It follows that the principals-appellants have failed to establish that accounts remain unsettled On the other hand, the agents-defendant have shown to our complete satisfaction that the accounts were accepted as settled by the principals themselves It follows that the decision of the Court below dismissing the principals' suit for an account is correct A S No 189 of 1962 is accordingly dismissed with costs.

For the very same reasons that we have given earlier, it is manifest that the claim of the agents to the sum of Rs 17,000 and odd, which has been decreed by the Court below, cannot be denied If the account had been stated or settled, it follows that the party in whose favour the account as settled stands is entitled to a decree for the amount. In the circumstances of the case, it was not necessary that there should

1. A I R. 1947 Bom 135 2 (1741) 2 Atk 251.

have been a preliminary decree to be followed by a determination of the actual liability The principals' appeal against the judgment of the Court below granting the agents a decree for the sum claimed on the basis of the accounts accordingly fails and is also dismissed with costs Counsel's fee one set

V.S ——— *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE P RAMAKRISHNAN AND MR JUSTICE R SADASIVAM

Sivasankara Mehta *Appellant**

v.

M/s Bagwandas Arjunlal, Bankers and others *Respondents*

Civil Procedure Code (V of 1908), *Order* 38, *rule* 11—*Scope—Attachment before judgment—Subsequent decree making the attachment final—Execution petition—Ss* 9 (e) *and* 12 (b) *of Presidency Towns Insolvency Act*—Terminus quo *for calculating the period of limitation, if to be counted from the date of the decree—Order* 38, *rule* 11, *if a deeming provision*

The petitioning-creditor attached before judgment the movable properties of the appellant in a suit filed by him in O S No 2783 of 1964 on the file of the City Civil Court, Madras The suit was decreed for a sum of Rs 4,550 on 20th November, 1964 and the attachment before judgment was made absolute on the same date On 19th March, 1965, the petitioning-creditor, the decree-holder in the above suit, filed an execution petition in the City Civil Court, praying for the sale of the movable of the appellant, which were the subject matter of the attachment. The execution petition was ordered on 31st March, 1965 and thereafter it was adjourned for filing sale papers The present insolvency petition was filed on 7th July, 1965. The learned Judge was of the opinion that the act of insolvency within the meaning section 9 (*c*) of the Act was completed on 21 days elapsed from 19th March, 1965, the date of the filing of the execution petition and that, therefore, the insolvency petition filed on 7th July, 1965 was within three months thereafter and therefore was in time

The effect of Order 38, rule 11 of Civil Procedure Code is to lay down when there is an attachment before judgment, and subsequently a decree is passed making the attachment absolute and if thereafter an execution petition is filed for executing the decree, the anterior attachment can be relied upon for the purpose of realising the amount of the decree by sale of the property without a fresh attachment

The purpose of a deeming provision in a statute is to create by a legal fiction something which was not there before But in cases where Order 38, rule 11, Civil Procedure Code, applies and an attachment had already existed before the execution petition is filed, that order merely declared a right in the decree-holder to proceed with the execution on the basis of the pre-existing attachment without the need to obtain a fresh attachment No question of deeming provision arises in such cases

The *terminus a quo* for computing the three months period of limitation under section 12 (*b*) of the Presidency Towns Insolvency Act is the actual date of filing of the execution petition followed by 21 days thereafter, and that this will be the case when filing of an execution petition follows an attachment before judgment and Order 38, rule 11 is applied thereafter.

Appeal under clause 15, Letters Patent, against the judgment of Ramamurti, J, dated 26th April, 1966 in Application No 238 of 1965 in I P. No 42 of 1965

P. Sivaramakrishnayya, M. Ramachandra Rao and *S Pitchai*, for Appellant.

M/s Aiyer and Dolia and Official Assignee of Madras, for Respondents.

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* O S A No 43 of 1966 and C M P Nos 12111 of 1967 and 13495 of 1967 — 28th November, 1967.

The Judgment of the Court was delivered by

Ramakrishnan, J—This appeal filed under the Letters Patent is directed against the order of Ramamurti, J, in I P No 42 of 1965, a petition filed by a creditor to adjudge one Sivasankara Mehta, the appellant, an insolvent. The ground relied on by the petitioning creditor is a brief one He alleged that the debtor's properties were attached in execution of a decree passed by the City Civil Court, Madras, for payment of money, that the attachment remained subsisting for a period of more than 21 days, and that consequently this amounted to an act of insolvency, as defined in section 9 (*e*) of the Presidency Towns Insolvency Act That section is in the following terms :

"A debtor commits an act of insolvency in each of the following cases :—

.. . .

(*e*) if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money"

Under section 12 (*c*) such a petition has to be filed by the creditor within three months from the act of insolvency relied upon It was alleged by the appellant in answer to the petition that the act of insolvency had occurred long prior to the period of three months before the presentation of the petition and that, therefore, the petition was barred by time The learned Judge held that the petition was not so barred, bearing in mind the relevant dates in the case, and adjudged the appellant insolvent as prayed for by the order dated 26th April, 1966 The debtor appeals.

Certain dates are important for the purpose of appreciating the points in controversy. The petitioning creditor attached before judgment the movable properties of the appellant in a suit filed by him in O S No 2783 of 1964 on the file of the City Civil Court, Madras The suit was decreed for a sum of Rs 4,550 on 20th November, 1964, and the attachment before judgment was made absolute on the same date On 19th March, 1965, the petitioning creditor, the decree-holder in the above suit, filed an execution petition in the City Civil Court, praying for the sale of the movables of the appellant, which were the subject-matter of the attachment mentioned earlier. The execution petition was ordered on 31st March, 1965, and thereafter it was adjourned for filing sale papers. The present insolvency petition was filed on 7th July, 1965 The learned Judge was of the opinion that the act of insolvency within the meaning of section 9 (*e*) of the Act was completed when 21 days elapsed from 19th March, 1965, the date of the filing of the execution petition and that, therefore, the insolvency petition filed on 7th July, 1965, was within three months thereafter and therefore was in time. Altenatively it was contended by the learned Counsel for the petitioning creditor before the learned Judge, that time should be reckoned for the purpose of limitation from 31st March, 1965, when notice of the execution petition for the purpose of proceeding with the sale of movables was served on the Registrar of the City Civil Court, Madras, and from that point of view the petition was in time But the learned Judge did not consider this alternative aspect, and gave the opinion that even if the date of the filing of the execution petition on 19th March, 1965, is taken into account, calculating 21 days thereafter, the insolvency petition must be considered to be well within time.

In this appeal, learned Counsel for the appellant, Mr Sivaramakrishnan, contended that on the principle laid down by several decisions of Courts in India the act of insolvency enunciated in section 9 (*e*) of the Act is not a continuing one and that the moment 21 days elapse from the date of the attachment of the property of an insolvent in execution of a decree for money, the act of insolvency becomes complete Thereafter the three months period of time has to be counted for the purpose of limitation under section 12 (*b*). The authorities relied on in this connection are In re *Beeton*[1], which was followed in *Mt. Anupama Debi* v. *Gurudas Chaterji*[2], and several other decisions Of these Mulla in his Law of Insolvency in India, 2nd Edition, at page 124 observed :

1. L.R (1899) 1 Q B. 626.
2. (1930) I.L R. 57 Cal. 1274.

"The fact that the attachment continues for more than 21 days is not a continuing act of insolvency. Nor is there a repetition of the act of insolvency at the expiration of every 21 days thereafter. Once these days have elapsed, the act of insolvency is complete. A petition therefore must be presented within three months of the first 21 days, though the attachment may continue for more than 21 days."

This principle has become well established in this country and has to be adopted in this case also.

The next and in fact the principal argument relied upon by the learned Counsel for the appellant is this. Order 38, rule 11, Civil Procedure Code, read thus :

"Where property is under attachment by virtue of the provisions of this Order and decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

The effect of this Order is to lay down that when there is an attachment before judgment, and subsequently a decree is passed making the attachment absolute and if thereafter an execution petition is filed for executing the decree, the anterior attachment can be relied upon for the purpose of realising the amount of the decree by sale of the property without a fresh attachment. According to the learned Counsel for the appellant, in such cases where the fact of attachment of a debtor's property in execution of a decree is relied upon as an act of insolvency under section 9 (*e*) of the Presidency Towns Insolvency Act, the *terminus a quo* for the purpose of calculating the three months period of limitation must be counted from the expiry of 21 days from the date of the decree which makes the attachment absolute. According to the learned Counsel, even though in fact an execution petition is filed long subsequent to the decree, Order 38, rule 11, Civil Procedure Code, must be viewed as a deeming provision having the effect of dating the execution petition retrospectively to the date of the decree itself when the attachment is made absolute. We are unable to agree with this contention The purpose of a deeming provision in a statute is to create by a legal fiction something which was not there before But in cases where Order 38, rule 11, Civil Procedure Code, applies and an attachment had already existed before the execution petition is filed, that order merely declares a right in the decree-holder to proceed with the execution on the basis of the pre-existing attachment without the need to obtain a fresh attachment. No question of deeming provision arises in such cases.

Further, if we are to concede the proposition put forward by the learned Counsel for the appellant, it will amount in many cases to casting an oppressive burden on debtors. The proposition amounts to saying that the moment the property is attached before judgment and the attachment before judgment is made absolute on the passing of the decree in the judgment, the attachment for the purpose of section 9 (*e*) of the Presidency Towns Insolvency Act will commence from the date of the decree irrespective of whether the decree-holder elects to execute the decree by filing an execution petition or whether he is prepared to give some accommodation to the judgment-debtor to satisfy the decree. In other words, on the expiry of 21 days from the date of decree, an act of insolvency becomes complete and the judgment-debtor will have to face the consequence of an insolvency petition which it may be open to any creditor to file within three months and 21 days after the passing of the decree Such an intention cannot be inferred either from the language of Order 38, rule 11, Civil Procedure Code, or section 9 (*e*) of the Presidency Towns Insolvency Act.

In the present case, it appears to us, that it is by reliance on the fact that such an extreme proposition will enable the appellant to urge a plea of limitation that this argument appears to have been put forward But on the other hand, if we are to concede the above proposition, the hardship that will be caused to debtors will in many cases be oppressive and unconscionable. It could not be the intention of the statute to impose such an onerous consequence, on the mere passing of a decree along with an attachment of the judgment-debtor's property made before judgment which becomes absolute on the passing of the decree.

Several decisions cited in this connection do not support the above extreme view taken by the learned Counsel for the Appellant In fact, the learned Counsel was fair enough to concede that the proposition which he has put forward above is without authority of a decision, and he wants us to lay down the law in the manner suggested by him for the first time in this case. On the other hand, if we read carefully the decisions cited at the Bar, there is practically a consensus of view to hold that the *terminus a quo* for computing the three months period of limitation under section 12 (*b*) of the Act is the actual date of the filing of the execution petition followed by 21 days thereafter, and that this will be the case when filing of an execution petition follows an attachment before judgment and Order 38, rule 11 is applied thereafter.

In *Dalayya* v. *Sundara Narayana*[1], Varadachariar, J., speaking for the Bench observed :

" As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court The more reasonble view seems to us to be to hold that, from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment is available for purposes of execution."

In *Ramanadhan* v *Veerappa*[2], a Bench of this Court held that before the attachment before judgment can become an attachment in execution of the decree, there must be some unmistakable declaration of the decree-holder's intention to execute the decree, that in ordinary cases such an election or declaration of intention would be made by presenting an execution application, but it does not seem that in every case without exception it should be done in this manner and in no other and that if the intention to execute can be inferred from other circumstances, it is sufficient. The decision in *Dalayya* v. *Sundara Narayana*[1], was followed by a recent Full Bench of this Court in *Subramaniam* v *Sundaram*[3], where the Full Bench observed :

" . . . an attachment before judgment automatically becomes an attachment in execution of the decree, when the decree-holder applies for an order of the Court directing the sale of the property attached and that the subsistence of such an attachment for more than 21 days after the application for sale has been made by the decree-holder can be relied upon as an act of insolvency under section 9 (*e*) of the Presidency Towns Insolvency Act."

Referring to the effect of Order 38, rule 11, Civil Procedure Code, in a Full Bench decision of this Court in *Arunachala Chettiar* v. *Periasami Servai*[4], Wallis, C J, who delivered the opinion of the Full Bench at page 910 of the report observed :

" Order 38, rule 11, does not in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Article 11 of the Limitation Act or of Order 21, rule 57 ...... .as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment "

Though that decision dealt with Article 11 of the Limitation Act, as well as Order 21, rule 57, Civil Procedure Code, in the context of Order 38, rule 11, Civil Procedure Code, the above observations will be equally valid when we have to construe what is meant by the terms "attachment in execution of a decree" for the purpose of section 9 (*e*) of the Presidency Towns Insolvency Act.

There is an observation of one of the learned Judge who constituted the above Full Bench, Spencer, J , at page 911 of the report :

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1 (1936) I L R 59 Mad 303 at 309 69 M L J 113
M L J 908
2 A I R 1937 Mad 84 at 89
3. I.L R (1963) Mad. 194 at 202 . (1963) 1
4 I L R (1921) 44 Mad. 902 at 910 : 41 M L J 252.

"If, on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree because Order 38, rule 11, declares that no re-attachment is necessary. As attachment is the first step in the execution of all decrees against property, just as sale or delivery of property is the effect of this provision is that execution is made to date back to the first attachment which was before judgment"

We cannot construe this observation of Spencer, J, which appears to have been nothing more than a passing observation, to imply that for the purpose of section 9 (*e*) of the Presidency Towns Insolvency Act, on the filing of an application for execution of a decree where there has been an attachment before judgment, a retrospective effect is given for the purpose of ante-dating the *terminus a quo* for the purpose of computing limitation under section 12 (*e*) of the Act to the date of the judgment when the attachment was made absolute. In fact, in a later Full Bench decision in *Meyyappa Chettiar* v *Chidambaram Chettiar*[1], which followed the decision in *Arunachala Chetti* v *Periasami Servai*[2], Ramesam, J, at page 508 of the report made the comment that in the earlier Full Bench decision Spencer, J, "may be regarded as going further than others" when he agreed with the other Judges to the extent that at least after the order for sale, the attachment before judgment becomes one in execution. In a decision of a Bench of this Court reported in *Chidambara Mudaliar* v *Ranganatha*[3], the question arose under section 9 (*e*) of the Presidency Towns Insovency Act In that case, the petitioning creditor filed a suit against the appellants and obtained an attachment before judgment which was confirmed when he obtained a decree on 27th July, 1941 On 11th September, 1941, the decree-holder applied for the sale of the property which was already under attachment. The Insolvency petition was filed for adjudicating the appellants on 17th October, 1941, relying on section 9 (*e*) of the Presidency Towns Insolvency Act The learned Judges observed that when an execution application is made, the attachment automatically becomes an attachment in execution of the decree and no other construction is open They followed the earlier decision cited above including the judgment of Varadachariar, J, in *Dalayya* v *Sundara Narayana*[4] No doubt, the occasion did not arise in that case for examining fully when the *terminus a quo* for purpose of section 12 (*e*) commenced, nor was a contention like the one urged by the learned Counsel for the appellant herein placed before the Court the only dispute was whether an attachment effected before judgment can be deemed to be an attachment in execution of the decree on the filing of a subsequent execution petition. But the observation of the learned Judges that on the making of an execution petition the attachment before judgment automatically becomes an attachment in execution of the decree shows that the Bench was having in mind the principle that the act of insolvency for the purpose of section 9 (*e*) of the Act would be committed only if the execution petition is filed and 21 days runs thereafter In fact, Mullah in his Law of Insolvency in India, 2nd Edition, to which we have made reference already, has referred to this judgment at page 124 of his book for holding,

"that an attachment before judgment can be relied upon as an act of insolvency where the decree-holder elects to avail himself of the attachment and applies for execution inasmuch as from the moment of such application the attachment becomes available for the purpose of execution there being no necessity for a fresh order of attachment by the Court"

In view of the above considerations, we are of the opinion that there are no merits in the appeal which is dismissed with costs of the petitioning creditor.

V.M.K. — *Appeal dismissed.*

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1. (1924) I L R 47 Mad 483 46 M L J 415
2. (1921) I.L.R 44 Mad 902 41 M L J 252
3. (1942) 1 M L J 428.
4. (1936) I L.R 59 Mad 303 69 M L J 908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE M M ISMAIL

M/s. Marisami Brothers by its Managing Partner M Marisami .. *Appellant**

v.

M/s Bluemount Switchgears Associates (Pte) Ltd , represented by its Managing Director S Palaniswami and others .. *Respondents*

Res judicata—*A mixed question of fact and law—Plaintiff not raising the plea of* res judicata *in the pleadings and in the issues—Plaintiff (appellant) if could be permitted to plead it in second appeal*

Civil Procedure Code (V of 1908), *section* 11—Res judicata—*The decree in earlier suit wholly in favour of the defendant—Finding on the genuineness of an Exhibit in favour of the plaintiff —Genuineness of the Exhibit directly and substantially in issue in the present suit, but not in the earlier suit—Finding in favour of the plaintiff if operates as* res judicata *in the present suit*

A plea of *res judicata* does not involve a pure question of fact and it involves a mixed question of fact and law and consequently the factual foundation for raising the plea of law must have been laid in the pleadings and in the issues.

As a matter of fact, it is significant that the defendants have raised the question of *res judicata* with regard to the maintainability of the suit itself on the basis of the decision in the earlier suit The plaintiff had ample opportunity to put forward any such plea of *res judicata* in relation to the genuineness of Exhibit A-1, and they did not do so. Under these circumstances, they cannot be permitted to raise the question for the first time in this second appeal.

For the applicability of section 11 of the Code of Civil Procedure and for invoking the bar of *res judicata* it must be established that the matter which is directly and substantially in issue in the present suit has been directly and substantially in issue in the former suit Notwithstanding the finding on the genuineness of Exhibit A-1 which was a finding in favour of the plaintiff, the suit of the plaintiff was dismissed solely on the ground that the plaintiff was not entitled to call upon the defendants to render accounts. The very fact that the suit of the plaintiff was dismissed notwithstanding that finding in favour of the plaintiff is sufficient to show that such a finding was not necessary for the disposal of that suit

The decree in the earlier suit was wholly in favour of the defendants and therefore the finding given in regard to Exhibit A-1 in the earlier suit cannot operate as *res judicata*, so as to prevent the defendants putting forward the contention that Exhibit A-1 is not a genuine document in the present suit

It cannot be said that the finding of the lower appellate Court that the document Exhibit A-1 was not in existence on 1st February, 1957, is not supported by any evidence.

Appeal against the Decree of the Court of the Subordinate Judge, Coimbatore, dated 24th December, 1963 in Appeal Suit No 126 of 1962 preferred against the decree of the Court of the District Munsif of Coimbatore in Original Suit No. 1301 of 1960

K S Champakesa Ayyangar and *K C Srinivasan*, for Appellant

S. Mohankumaramangalam and *V Varadarajan*, for Respondents

The Court delivered the following

JUDGMENT —Defendants 4 to 9 were partners carrying on business as Messrs. Ramakrishna Metal and Alloy Industries, the 2nd defendant The fourth defendant was also the sole proprietor of the third defendant, namely, Messrs General Pump Factory. It is the common case of both sides that subsequent to the events which have taken place constituting the cause of action of the plaintiff, the businesses of the second and third defendants were taken over by the first defendant

*S.A. No. 949 of 1963 29th November, 1967.

Before dealing with the contentions raised in the present appeal, it is necessary to set out certain facts as providing the background for instituting the suit which gave rise to the second appeal The managing director of the first defendant filed O. S No 1243 of 1959 for recovery of a sum of Rs 2,302-99 from the plaintiff in the suit The plaintiff also filed O. S No 1419 of 1959 against all the defendants in the present suit for production of their accounts of sale etc., for the period from 1st February, 1957, for appointment of a Commissioner to examine the accounts and for arriving at the amount due to the plaintiff, including damages and for ordering the defendants in that suit to pay the amounts so found due by the Commissioner. Since we are concerned only with the latter suit, namely, O S No 1419 of 1959, a reference to the facts in that case is necessary and relevant The case of the plaintiff in that suit was that he was the sole convassing agent of defendants 2 and 3 for the sale of pumps manufactured by them and he was so appointed by a letter dated 1st February, 1957, under which he was entitled to a commission of 5 per cent. in respect of the sales effected by or through him and an overriding commission of 2½ per cent on all the sales effected by defendants 2 and 3 over certain areas specified in that letter The defendants resisting the claim *inter alia* contended that the letter dated 1st February, 1957 was a forgery In that suit, the trial Court framed several issues and three of them are necessary they being Issues 3, 4 and 5 and they are as follows .—

Issue 3 : Whether the letter dated 1st February, 1957 is a forgery ?

Issue 4 Whether the plaintiffs are entitled to any commission , and

Issue 5 . Whether the plaintiffs are entitled to demand accounting ?

The trial Court on Issues 3 and 4 found in favour of the plaintiff. It came to the conclusion that the plaintiff was acting as a commission agent of the two defendants upto the end of 1958 and was entitled to a commission of 5 per cent. on the sales and an annual overriding commission of 2½ per cent However, with regard to Issue No 5 referred to above, the trial Court was of the opinion that the plaintiff, even according to his own case being only an agent of the defendants, had no right to demand an accounting from the defendants Consequently, Issue No 5 mentioned above, was decided against the plaintiff In view of this finding the trial Court observed that the plaintiff was not entitled to maintain the suit for accounts With this observation, the trial Court dismissed the suit, but pointed out that the plaintiff was at liberty to file a fresh suit claiming the commission due to him on the same cause of action It is this judgment which becomes final has given rise to the present suit I must point out that the common case of both the parties is that the dispute involved in the suit relates to only the overriding commission of 2½ per cent and not to the 5 per cent on the sales effected by or through the plaintiff. Since the defendants concede that the plaintiff was their salesman and was entitled to the commission of 5 per cent , the present suit, namely, O S. No 1301 of 1960 was filed by the plaintiff for recovery of a sum of Rs 3,650-17 representing the 2½ per cent. overriding commission in respect of certain sales effected in the area covered by Exhibit A-1 The case of the plaintiff in his plaint was that he was the sole canvassing agent to the products of defendants 2 and 3 for six districts as per the appointment order dated 1st February, 1957. The claim of the plaintiff was resisted on several grounds, one of the grounds being that the letter dated 1st February, 1957, was a forgery and the fifth defendant who signed that letter was colluding with the plaintiff The trial Court framed nine issues, Issue 2 being whether the suit is barred by *res judicata* and Issue 6 being whether the appointment letter dated 1st February, 1957, is a forgery The trial Court by judgment and decree dated 24th November, 1961, decided these issues in favour of the plaintiff The trial Court came to the conclusion that the suit was not barred by *res judicata* on the ground that the earlier suit was for rendition of accounts while the present suit was for recovery of money on accounts With reference to Issue No 6, the trial Court came to the conclusion that Exhibit A-1, namely, the letter dated 1st February, 1957, was not a forgery but a true and genuine letter binding not only on the second defendant-firm but also on the third defendant-firm by their conduct and payment of commis-

sion etc, and that they had appointed the plaintiff as their sole canvassing agent with effect from 1st February, 1957, for a period of three years.

On appeal, preferred by the defendants, the learned Subordinate Judge of Coimbatore reversed the judgment and decree of the trial Court and dismissed the suit of the plaintiff. As far as the contention regarding *res judicata* was concerned, the Court came to the conclusion that the suit of the plaintiff was barred by *res judicata* in view of the decision in O S No 1419 of 1959. With regard to Exhibit A-1 the learned Judge came to the conclusion that that was a forged document in the sense that on 1st February, 1957, it was not in existence and that it was brought about subsequently in collusion between the fifth defendant and the plaintiff and that it was not binding on the defendant The plaintiff has filed the present Second Appeal against this judgment and decree of the learned Subordinate Judge

Mr Champakesa Ayyangar, the learned Counsel for the appellant, raised the following contentions in support of his appeal

(1) In the earlier proceedings, namely, in O S No 1419 of 1959, the Court has given a finding that the letter dated 1st February, 1957 was a genuine letter issued by the defendants and the same was binding on the defendants and consequently that finding is binding on all the parties in the present suit and the question was not open to be re-agitated;

(2) Even assuming that it was open to the Court in the present suit to go into the question, the finding of the learned Subordinate Judge, that the document was a forged one in the sense that on 1st February, 1957 it was not in existence and that it was brought about subsequently in collusion between the fifth defendant and the plaintiff, is not supported by any evidence.

(3) The conclusion of the learned Subordinate Judge that the present suit is barred by *res judicata* in view of the decision in O S No 1419 of 1959 is not tenable in law, since the cause of action and the relief prayed for in both the suits were not the same Mr Mohan Kumaramangalam, learned Counsel for the respondents, disputed these contentions of Mr. Champakesa Ayyangar.

As far as the first contention of Mr Champakesa Ayyangar that it is not open to the Courts below in this suit to go into the question of genuineness of Exhibit A-1; since there was a finding that the same was genuine and binding in O S No. 1419 of 1959 is concerned: I reject that contention for two reasons. The first reason is this: admittedly this question relating to the finding in respect of Exhibit A-1 being *res judicata* binding on all the parties was not raised either in the pleadings or argued before the Courts and it was sought to be raised only in the second appeal before me The contention of Mr Champakesa Ayyangar is that all the facts necessary for raising that plea are to be found in the materials placed before the Courts and consequently, on the basis of those materials, he is entitled to raise that plea in the second appeal before this Court. I am of opinion that this contention is not tenable In the first place a plea of *res judicata* does not involve a pure question of fact and it involves a mixed question of fact and law and consequently the factual foundation necessary for raising the plea of law must have been laid in the pleadings and in the issues Mr Champakesa Ayyangar relied upon the judgment of the Supreme Court reported in *Yeswant* v. *Walchand*[1], and relied upon a passage in relation to the applicability of section 18 of the Limitation Act to the effect that:

> "if the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious as the question of applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final Court of Appeal."

In my opinion, this decision is not of such assistance to the learned Counsel for the appellant The very passage relied upon by the learned Counsel assumes that all the facts necessary for raising the applicability of section 18 were placed before

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1. (1951) S C J. 19-. (1950) S C R. 852 : A.I.R. 1951 S C. 16.

the Court and were proved and found established But as far as the plea of *res judicata* is concerned, that plea has to be established only by making the necessary averments and producing evidence in support thereof and therefore this judgment does not advance the contention of the learned Counsel On the other hand, Mr. Mohan Kumaramangalam relied upon the decision of the Privy Council in *Jagadish Chandra Deo* v *Gour Hari Mahatae*[1]. The following passage occurring in the judgment is enough for the purpose of bringing out the point involved :—

" Two questions are involved, the first being the question of *res judicata* The High Court declined to allow the appellant to go into the question of *res judicata* on the ground that it had not been properly raised by the pleadings or in the issues, particularly in the issues. It seems to their lordships that the High Court was right in this view, because it was necessary for the appellant, if he were going to make use of the judgment in the suit of 1900 as *res judicata* to identify the subjects in dispute in the present case with the subjects which in that case were held to belong to the Rajah and not to the tenants "

This decision, in my view, fully supports the case of the respondents and is against the app ellant As a matter of fact, it is significant that the defendants have raised the question of *res judicata* with regard to the maintainability of the suit itself on the basis of the decision in the earlier suit The plaintiff had ample opportunity to put forward any such plea of *res judicata* in relation to the genuineness of Exhibit A-1, and they did not do so Under these circumstnces, I am of the view that they cannot be permitted to raise the question for the first time in this second appeal.

The second reason for rejecting the contention of Mr. Champakesa Ayyangar with regard to the plea of *res judicata* in respect of the finding on Exhibit A-1 is that the finding in O S No 1419 of 1959 that the document was genuine was a finding on an issue which was not necessary for the disposal of that suit For the applicability of section 11 of the Code of Civil Procedure and for invoking the bar of *res judicata* it must be established that the matter which is directly and substantially in issue in the present suit has been directly and substantially in issue in the former suit As I pointed out already, notwithstanding the finding on the genuineness of Exhibit A-1, which was a finding in favour of the plaintiff,the suit of the plaintiff was dismissed solely on the ground that the plaintiff was not entitled to call upon the defendants to render accounts. The very fact that the suit of the plaintiff was dismissed notwithstanding that finding in favour of the plaintiff is sufficient to show that such a finding was not necessary for the disposal of that suit In this connection, Mr Mohan Kumaramangalam, the learned Counsel for the respondents, invited my attention to a decision of this Court reported in *Srinivasa Row* v *Kaliaperumal*[2], where it was held that for a finding in an earlier suit to operate as *res judicata* in a subsequent suit, it must have been necessary for the disposal of the earlier litigation, and, in that sense, the point was substantially in issue between the parties and must have been heard and finally decided The learned Counsel also relied upon the decision reported in *Kumarappa* v *Raghunatha*[3], and relied upon the following passage occurring in the judgment :

" If the decree is wholly in favour of the defendant, no issue decided against him can operates as *res judicata* so as to bind him in a subsequent suit,for, he cannot appeal from a finding on any such issue Conversely, if the plaintiff's suit is decreed in its entirety, no issue decided against him can be *res judicata* for he cannot appeal from a finding on any such issue, the decree being wholly in his favour "

The decree in the earlier suit was wholly in favour of the defendants and therefore the finding given in regard to Exhibit A-1 in the earlier suit cannot operate as *res judicata* so as to prevent the defendants putting forward the contention that Exhibit A-1 is not a genuine document, in the present suit.

1. A I R 1936 P C 258
2. (1966) 79 L.W. 180.
3 (1932) 62 M L J 141 · I L R. 55 Mad. 483 : A.I.R. 1932 Mad. 207 at 211.

Hence, the second contention of Mr. Champakesa Ayyangar has to be considered as to whether there is any evidence to support the finding of the lower appellate Court that Exhibit A-1 was not in existence on 1st February, 1957 and it was brought about subsequently in collusion between the fifth defendant and the plaintiff There is ample evidence which has been discussed by both the Courts to support the finding that Exhibit A-1 would not have been in existence on 1st February, 1957 The evidence has been referred by both the Courts and the only difference is that the trial Court after discussing the evidence came to the conclusion that the document was a genuine one, while the lower appellate Court came to a contrary conclusion Learned Counsel for the appellant had taken me through the judgments of both the Courts and the evidence adduced by the parties with reference to this point In my view, it cannot be said that the finding of the lower appellate Court that the document Exhibit A-1 was not in existence on 1st February, 1957 is not supported by any evidence Mr Champakesa Ayyangar further contended that when it was admitted that the fifth defendant, who was the managing partner of the second defendant, had signed the document, it must follow that it was binding on all the partners and there is no evidence to support the finding that the fifth defendant had executed the document in collusion with the plaintiff Here again it is not possible for me to accept the contention of the learned Counsel. The sixth defendant who had been examined as D W 1 had stated that from the end of December, 1956 there has been ill-feeling between the other partners and the fifth defendant and the ill-feeling was due to avarice and greed in the business and had further stated that Exhibit A-1 was brought into existence with the aid of the fifth defendant If the lower appellate Court had drawn the inference from this evidence that Exhibit A-1 was brought into existence in collusion between the fifth defendant and the plaintiff, it cannot be contended that there was no evidence to support this finding, particularly in view of the other finding that the document Exhibit A-1 bearing date 1st February, 1957 was not in existence on that date Since the claim of the plaintiff in the suit relates to recovery of 2½ per cent overriding commission and the basis of that claim is only Exhibit A-1 on the finding that Exhibit A-1 was brought into existence by collusion between the plaintiff and the fifth defendant and therefore was not binding on the partnership as such, it must follow that the claim of the plaintiff for recovery of this sum claimed by him must necessarily fail I must also point out one other factor, namely, that, in so far as the plaintiff had rested his claim for the recovery of the money solely on the basis of Exhibit A-1 no claim against the third defendant can be substantiated on the strength of Exhibit A-1 since admittedly, the third defendant came into existence only subsequent to 1st February, 1957 and consequently by no stretch of imagination it can be contended that the fifth defendant, when he was alleged to have executed the document on 1st February, 1957 did so on behalf of both the second defendant and the third defendant

Since I uphold the finding of the lower appellate Court with regard to Exhibit A-1 not being a genuine document, in the sense that it was not in existence on 1st February, 1957 and was executed by the fifth defendant in collusion with the plaintiff, and, on that basis the appeal has to be dismissed, it is unnecessary for me to express any opinion on the third contention as to whether the suit by the present plaintiff was barred by the principle of *res judicata* or not, because of the decision in the earlier suit O S No. 1419 of 1959

Under these circumstances, this second appeal fails and the same is hereby dismissed The parties will bear their respective costs throughout.

No leave

V M K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Ibrahim Bivi and others .. *Appellants**

v.

K. M. M. Pakkir Mohideen Rowther .. *Respondent*

Mohamedan law—Gift—House—By grandmother to grandson—Father—Natural guardian of minor, alive—Validity—Principles—Donor if should vacate the house—Donor and donee living in the gifted house—Reservation of right of residence by donor—Acceptance of gift by minor reaching age of discretion—Delivery of possession—If should be made only to the natural guardian.

Under the Mohamedan law, in the case of a gift of a house, it is not necessary that a donor should depart from the house in order to make the gift effective If the donor and donee live in the same house that would be sufficient to show that possession has been given The reservation by the donor of the right to reside in the house along with the donee during his lifetime does not detract from the validity of a gift.

If the donee happens to be a minor and if he has attained the age of discretion he is competent to accept the gift It is not necessary that in all cases, the donor should hand over possession to the natural guardian of the minor donee.

In proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as to justify such a course of action.

All these, of course, apply only where there is a clear intention to make a gift and to deliver possession.

The gift in the present case by the grandmother in favour of her grandson was held to be valid

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli in Appeal Suit No 91 of 1962 preferred against the decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 152 of 1961

T. R. Ramachandran, for Appellant

K. Sarvabhauman and *T. R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT.—The question that arises for decision in this case is about the validity of the settlement deed Exhibit B-5, dated 20th December, 1937, executed by Kathija Bivi, the paternal grandmother of the defendant in this case in his favour. The defendant is the son by the first wife of one Mohideen Pichai The first plaintiff is the second wife of Mohideen Pichai and plaintiffs 2 to 6 are her children Kathija Bivi died on 1st December, 1949 and Mohideen Pichai in 1958 There was an earlier suit, O S No. 54 of 1959, filed by the defendant against the plaintiffs for partition of the family properties That suit was decreed on 29th February, 1960, holding the settlement executed by Kathija Bivi valid. A S No 146 of 1960 filed against the decree in O. S No 54 of 1959 was dismissed on 18th October, 1960, but the question regarding the validity of Exhibit B-5 was left open The plaintiff filed the present suit on 14th February, 1961 claiming that there was a family arrangement on 25th December, 1961 under Exhibit A-1 by which they got the defendant's 14/88 share in the suit property by paying him Rs 700 Alternatively they claimed that the settlement Exhibit B-5 is not valid and that they were, therefore, in any case, entitled to a 74/88th share in the suit property Both the Courts below have found that the family arrangement pleaded by the plaintiffs is not proved and that being a pure question of fact, it is not open to this Court to go behind that finding of fact There-

* S A. No 369 of 1964. 13th February, 1968.

fore, the only question that arises is, whether the settlement deed Exhibit B-5 is not valid? There is no doubt that if it were not valid, the plaintiffs would be entitled to a 74/88th share and the defendant only to a 14/88th share in the suit property.

It appears that at the time when Exhibit B-5 was executed, the defendant's father Mohideen Pichai had married the first plaintiff as the second wife and the defendant being motherless was being brought up by the grandmother and out of natural love and affection, she executed the settlement in question It may incidentally be mentioned that soon after the execution of Exhibit B-5, Mohideen Pichai filed a suit questioning that settlement, but later withdrew it

The argument on behalf of the appellants, that is the plaintiffs, is that the settlor had not parted with possession of the property and given possession to the settlee, that in any case, she was not the guardian of the settlee and therefore, she should have given possession to the defendant's father, that is, Mohideen Pichai, that Mohideen Pichai, had not assented to this settlement as shown by the suit filed by him and that therefore, the settlement would not be valid on all these grounds. In Asaf A A Fyzees' Outlines of Muhammadan Law, Third Edition, at page 221 it is said :

> " Develivery of possession is therefore an essential characteristic of the Islamic law of gifts.. . .. .Therefore, the taking possession of the subject-matter of the gift by the donee, either actually or constructively is necessary to complete a gift . . . . "

Then at page 222 it is said :

> " First, in the case of immovable property which is in the exclusive possession of the donor, it is necessary that the donor should physically depart from the premises, and hand over the possession formally to the donee, and that the donee should accept such possession If a person lives in a house and purports to make gift by saying to the donee ' take possession ' or ' I have delivered possession ' and no overt act of tender and acceptance of possession takes place, there is no gift . .. ."

Then at page 223 the following passage occurs :

> " The general principle is that possession must be handed over ; to this rule there are certain qualifications and exceptions which we shall now proceed to consider Transfer of possession is not necessary.
>
> (1) Where the donor and the donee reside in the same house; . . .
>
> (2) Where a guardian makes a gift to the ward ,
>
> (1) *Residence in the same house* , where the donor and the donee reside in the same house, the donor can complete the gift without physical transfer of possession; but there must be the unequivocal manifestation by the donor of an intention to transfer exclusive possession to the donee . . . . "

A muslim lady, who had brought up her nephew as her son, executed a deed of gift, in favour of the nephew, of a house in which they were both residing at the time of the gift The donor never departed from the house physically, nor was the house formally handed over to the donee, but the property was transferred, and the rents were recovered in his name. It was held that the gift was valid, although there was no physical delivery of possession. *Humera Bibi* v *Najm-un-Nissa*,[1] *Muhammad Yusuf Rowther* v *Muhammad Yusuf Rowther*[2] If, however, certain important steps for divesting ownership were not taken, then the Court is entitled to presume that the gift was not complete For example, a Muslim lady and her nephew resided in a house which belonged to the lady The lady executed a deed of gift in favour of her nephew. There was no formal delivery of possession; no mutation of names was effected , the nephew continued to live in the house with his aunt , the deed was not delivered to the nephew ; the aunt continued to pay the municipal taxes. In these circumstances, it was held that there was no

1. (1905) I L R 28 All 147. 2 (1958) 1 M L J 14 A.I R 1958 Mad 527

valid gift."

Dealing with the question of gifts from father to child mother to son, guardian to ward, we find the following passage :

" Where a father or mother makes a gift of immovable property to their minor child, no physical transfer of possession is necessary. The same is the rule between guardian and ward. One reason for the rule is that this would involve the absurdity of the owner of the property (parent) handing over possession to himself as guardian of the child In *Ameeroonissa* v *Absdoonissa*[1], their Lordships of the Privy Council stated that " where there is, on the part of the father or other guardian, a real and *bona fide* intention to make a gift the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor ' Where for instance, the gift is made to an infant by a person other than the father or guardian, the gift is rendered complete by the seisin of the father of the infant.

The real basis of the exception is that delivery of possession is excused only when the legal guardianship of the minor vests in the donor. Thus, a gift by a grandfather to his grandson would not be within the the exception where the father is alive and has not been relieved of his legal guardianship A decision of a Privy Council makes this perfectly clear *Musa Miya* v *Kadar Bux*[2] .. .

Nor can a mother, who is not a legal guardian, accept such a gift on behalf of her minor children, from their grandfather "

In this case the settlement deed provides that by the settlement, the property has been transferred to the settlee, that the settlor and the settlee were to enjoy the property together, that as the settlee was a minor, the settlor would look after the property as the settlee's guardian till he became a major, that after the settlor's lifetime, the settlee would enjoy the property absolutely, that during the settlor's lifetime, neither the settlor nor the settlee was entitled to alienate the property and that if any such alienation was made, it would not be valid Now, it is obvious that the first part of the settlement deed whereby the settlor purports to transfer the property to the settlee indicates a clear intention to transfer the property I think the fact that till the settlee became a major the settlor was to look after the property as guardian, would not in any way detract from that fact that the property was transferred unconditionally to the settlee The subsequent recitals in the document that the settlee was to enjoy the property absolutely after the settlor's lifetime, would not in any way, cut down the absolute transfer earlier indicated, nor would the fact that the settlor and the settlee are said to have no right to alienate the property during the settlor's lifetime affect the transfer in any way Though the wording of the document is a little confused, there is a clear intention to part with possession of the property immediately and the fact that the settlor and the settlee were to reside together in the property, would not in any way show that possession was not handed over. Decisions have held that where the property gifted is a house and the settlor and the settlee reside in that house, it is not necessary for the settlor formally to depart from the house in order to indicate that the settlee has been given possession of the property gifted

It is, however, urged on behalf of the appellants that under Muhammadan Law only the father and the grandfather are the guardians of a minor, that the paternal grandmother is not the guardian and that therefore, as the possession of the property had not been given to the father though he was alive and the father himself had expressly repudiated the settlement-deed by filing a suit, questioning the settlement, possession cannot be said to have been given to the minor's guardian It should, however, be remembered that under Mohammadan Law, there is no objection to a minor himself getting possession of the property and as the minor in this case resided with the settlor and the settlee had the manifestly clear intention to part with the possession of the property, the settlee should be deemed to have obtained possession I do not think that the decision in *Musa Miya* v. *Kadar Bux*[2]

1. (1874) L R 2 I A 87
2 (1928) 54 M L J 655 : L.R. 55 I A 171 : A I R 1928 P C. 108

in any way is against this position. In that case a maternal grandfather was alleged to have made a gift to his grandsons The grandsons were minors They and their parents lived in the house of the donor There was no mutation of names and no deed was executed, the grandfather continued to be in possession of the property and there was no evidence to show that the donor in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf It was, therefore, held that the case did not come within the exception to the general rule and therefore, the gift was not complete in the absence of any delivery of possession or relinquishment of control over the property by the grandfather At page 111 of the above decision, it is observed that the rule (that possession need not be given) applies to the case of a mother making a gift to her infant son whom she maintains only when the father is dead and no guardian has been provided. It was further observed as follows

> " The rule applies also to the gift by any other person maintaining a child under these circumstances, *i e*, when the father is dead and no guardian has been provided This seems to imply that when the father, who is the natural guardian of his infant children is alive and has not been deprived of his rights and powers of guardian, the above mentioned rule will not apply "

On this it is urged on behalf of the appellants that as in this case, the father was alive, the rule as to possession not having to be given, does not apply. That case it appears to me was really decided on the fact that the grand-father did not relinquish control and except a bare declaration there was nothing else to show a clear intention on the part of the donor to part with possession of the property In *Mt Saidunnisa* v *Inam Llahi*[1], it was held that no change of possession is necessary in the case of a gift by a grandfather to his minor grandson, if the father is dead, for the grandfather is then the proper person to take delivery on behalf of his grandson as his guardian Then it was observed as follows :

> " But if the father is alive and has not been deprived of his rights and powers as guardian there must be a delivery of possession by the grandfather to the father as guardian of his minor son , otherwise the gift is not complete The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession "

This decision purported to follow the decision in *Musa Miya* v *Kadar Bux*[2], already referred to In *Suna Meah* v *Pillai*[3], it was held as follows ·

> " In order to perfect a gift by a Mohammadan it is necessary to make over possession of the property to the donee If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor The exception in case of a gift by the father cannot be extended to a gift by the maternal grandfather. Delivery of possession to the mother of the minor donee is of no use."

This case also purported to follow the decision of the Privy Council earlier referred to. In *Pichakannu* v *Aliyarkunju Lebba*[4], it was held as follows :

> " It is a fundamental rule of Mohammadan Law as regards gifts that the donor should divest himself completely of all ownership and dominion over the subject of the gift It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of A gift with a reservation of possession by the donor during his lifetime is void By reserving undisturbed his rights to be in possession and enjoyment the donor did not divest himself completely of all dominion over the properties, though in a sense he purported to associate the donees with himself, nor could such associating the donees in the matter of possession and enjoyment with him be deemed to be delivery of such possession, if at all, as the properties were susceptible of Therefore, a stipulation that the donor and the donees shall be in joint possession will not satisfy the requirement of delivery of possession in a gift under the Muhammadan Law Even where

1. A I R 1932 Lah 316
2. 54 M L J 655 55 I A 171 A I R 1928 P C. 108
3. A I R 1933 Rang 155.
4. (1963) K L T 226

the donee resides with the donor in the property, although no physical departure by the donor or formal entry by the donee is necessary, the gift has to be completed by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject-matter "

" It is quite clear, that by Exhibit I the donor did not divest himself completely of all dominion over the properties gifted but reserved possession and enjoyment with himself ... The donees were entitled to the properties absolutely only after the lifetime of the donor "

These decisions seem to support the appellants' contention In *Abdul Raheman* v *Mishrimal*[1] it was held that where a gift by a grandfather to his minor grandsons of immovable property was made and delivery of possession was accepted on behalf of the minors not by their father who was alive, but by their mother, the gift was not complete The decisions relied on were the decisions in *Musa Miya* v. *Kadar Bux*[2] and *Suna Meah* v. *Pillai*[3], already referred to

But the trend of later decisions is towards the liberalisation of the rigours of the Islamic Law of Gifts. As already mentioned it has been held that where what is gifted is a house, it is not necessary for the donor formally to depart from the house in order to complete delivery of possession It has also been held that as between the husband and wife, it is not necessary for either party to depart from the house and they could continue in possession in the same house gifted and delivery would still be complete It has also been held as seen from the passage quoted earlier from the decision in *Musa Miya* v *Kadar Bux*[2], that where a guardian makes a gift to the ward and the father or the grandfather is not alive, the rule regarding the delivery of possession to the natural guardian does not apply This trend of decisions is reflected in the decision of a Bench of this Court in *K Veerankutty* v *P Umma*[4]. There the document under consideration recited as follows —

" I have out of natural love and affection I have for Nos 1 and 2, released or surrendered by assignment gift all my rights to the kanom reclamation, house and improvements thereon as per terms stated thereunder But till my death I shall keep and enjoy the properties of the schedule without any munpattom or creating any mortgage or debt or alienating the same and it is settled that after my death Nos 1 and 2 should keep the properties and enjoy the same with all rights of alienation and disposition "

It was further held as follows .—

" .. ..that the recitals taken as a whole indicated an absolute divestment of all the rights of the donor in the property with liberty to keep possession and enjoy the income from them till his death The clauses could not be understood as creating a life estate with a vested remainder

That the reservation to be in possession of the property and enjoy the income therefrom during the lifetime of the donor could not be understood as derogating from the earlier grant but it was only an affirmation or reservation of a subordinate right to enure for a specified period "

In that case there were two donees and the donor was the natural guardian of the first donee and it was, therefore, held that there was no necessity to deliver possession It should be noticed that the facts of the presest case are much stronger from the point of view of the donees than the facts in *K Veerankutty* v *P Umma*[4], except with regard to the fact that in this case the donor is not the natural guardian of the donee. In *Md. Yusuf* v *Md. Usuf*[5], Rajagopala Aiyangar, J took into account the relationship between the donor and the donees, as well as the fact that they were jointly residing in the premises, to hold that there was no necessity for the donor to remove himself from the premises in order that the gift may be operative. In the decision of the Supreme Court in *Katheessa Umma* v *Narayanath Kunhamu*[6], in paragraph 11 it was held as follows .

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1. A.I.R. 1960 Bom. 210.
2. 54 M L J 655 L R. 55 I A 171 A I R 1928 P C 108
3. A I R. 1933 Rang 155
4. I L R (1956) Mad. 1004 (1956) 1 M L J 195 A I R 1956 Mad 514
5. (1958) 1 M L J 14 · A.I.R (1958) Mad. 527
6. (1964) 4 S C R 549 A I R 1964 S.C. 275.

"It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession

.. ..

Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child. Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife. In *Mohamed Sadiq Ali Khan* v. *Fakhr Jahan Begum*[1], it was held that even mutation of names is not necessary if the deed declares that possession is delivered and the deed is handed to the wife. A similar extension took place in cases of gifts by a guardian to his minor Ward. . In the case of a gift to an orphan minor the rule was relaxed in this way :

'If a fatherless child be under charge of his mother, and she take possession of gift made to him it is valid . The same rule also holds with respect to a stranger who has charge of the orphan' . . . . . . In the case of the absence of the guardian (Gheebut-i-Moonqutaa) the commentators agree that in a gift by the mother her possession after gift does not render it invalid. Thus, also brother and paternal uncle in the absence of the father are included in the list of persons who can take possession on behalf a minor who is in their charge. Durrul Mukhtar, Vol. 4, p. 512 (Cairo Edn.).

In Radd-ul-Mukhtar it is said :

'It is laid down in the Barjindi. There is a difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid and the correct opinion is that it is valid.' Vol. 4, Order 513 (Cairo Edn.).

In the Bahr-al-Raiq, Vol. 7, page 314 (Edn. Cairo) 'The rule is not restricted to mother and stranger but means that every relation excepting the father, the grandfather and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge otherwise not . .'

The rule about possession is relaxed in certain circumstances of which the following passage from the Hedaya P. 484 mentions some. 'It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she has been sent from her father's house to his, and this although the father be present; because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with respect to a mother or any other having charge of her, because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present.'"

In paragraph 15 the conclusion was reached as follows :—

"These cases show that the strict rule of Mohammadan Law about giving possession to one of the state guardians of the minor is not a condition of its validity in certain cases. One such case is gift by the husband to his wife and another where there is gift to a minor who has no guardian of the property in existence."

The latest decision in the series is that of Ramamurti, J., in *Ayeshabi* v. *Saprakara Kathoonbi*[2]. In that case, the gift deed executed by a Muslim woman to her son and her minor daughter represented by the donor's son as guardian recited that possession of the property has been delivered over to the donee. The property was

1. (1932) 62 M.L.J. 320 : L.R. 59 I.A. 1 : A.I.R. 1932 P.C. 13.

2. I.L.R. (1966) 1 Mad. 187 : 79 L.W. 502.

a residential house in which the donor and her children and the donees were living together It was held that every presumption should be made in favour of the validity of the gift when the conduct of the parties spread over a long interval of 23 years shows that the gift was given effect to and they have stood by it by accepting the validity of the gift and that Mohamedan Law requires evidence of handing over possession to the donee and the donee's acceptance of the gift mainly as proof of the intention of the donor to pass title to the donee, so that if this requirement is complied with, all future disputes about the truth and factum of gifts shall be avoided, and that in applying the rules of Mohamedan Law relating to the gifts, the rigour of unmeaning technicalities should not be enforced, divorced from the realities of the particular situation in individual cases and Courts should avoid an impractical approach to the question and that there is no warrant for the contention that under Mohamedan Law, whatever may be the subject-matter of gift, and whatever may be the circumstances, in which the gift is made, if the donee happens to be a minor, there should be delivery of possession to the guardian of the minors, and that the rule of Mohamedan Law that delivery and possession should be effected to the father as the guardian and the latter should accept the gift can have no application to a case in which the donor specifies some other person as the guardian to take possession and accept the gift on behalf of the donee, and that there is nothing in principle (in Mohammadan Law) or in the decisions which compels the view that regardless of all considerations and regardless of the father's indifferences, his wayward habits and other adverse factors, any person who desires to make a gift to the minor son could do so only by delivering the property to such a father. That decision is a complete answer to the contention of the appellants The learned Judge referred to the decision in *Mt. Fatma, W/o. Fiaz* v *Mt Avtun*[1], wherein Tyabji, J observed as follows

> " There is nothing in Mohamedan law or outside it which prevents a minor from accepting a gift or taking possession of the property
> It is true that section 11, Contract Act prevents a minor from effecting a binding contract, ...
> While this disability renders a minor incompetent to act as a transferor, by reason of section 7 of the Transfer of Property Act, a minor is not incapable of receiving benefits and being a transferee, as he is not a person legally disqualified to be a transferee within the meaning of sub-section (*h*) of section 6 of the Act "

The learned Judge also referred to the decision in *Munnibi* v *Abdul Gani*[2], where a Bench held that the donee of a gift is not precluded by minority from accepting the gift and that where the document embodying the intention of the donor to give the property in gift is delivered by the donor to the donee and accepted by him it amounts to acceptance of the gift on his part The conclusions that flow from a consideration of the various decisions may be stated as follows

In the case of a gift of a house, it is not necessary that a donor should depart from the house in order to make the gift effective If the donor and the donee live in the same house, that would be sufficient to show that possession has been given. The reservation by the donor of the right to reside in the house along with the donee during his lifetime does not detract from the validity of a gift If the donee happens to be a minor and if he has attained age of discretion (in this case the donee was aged 15 and he should certainly have attained the age of discretion) he is competent to accept the gift It is not necessary that in all case, the donor should hand over possession to the natural guardian of the minor donee In proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as to justify such a course of action All these, of course, apply only where there is a clear intention to make a gift and to deliver possession It follows therefore that the gift in favour of the first defendant in this case is valid and this appeal has, therefore,

1. A.I.R. 1944 Sind 195 2. A.I.R. 1959 M.P. 225.

to be dismissed and it is, accordingly, dismissed There will be no order as to costs. No leave

V S —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N KRISHNASWAMY REDDY

Ellappa Goundar *Petitioner**

v

Govindaraja Goundei . *Respondent*

Criminal Procedure Code (V of 1898), *section* 147 (1-*A*)—*Magistrate deciding dispute under —If can receive and act upon evidence on affidavits*

Section 147 (1-A), Criminal Procedure Code, makes it clear that the Magistrate can receive evidence and act upon such evidence whereas section 145 (1) provides for filing of affidavits Under section 145 (4) the Magistrate can peruse the affidavits In contradistinction to section 145 (1) and (4), section 147 (1-A) does not give power to the Magistrate to receive affidavits and consider them but he can only receive evidence and consider the same

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Villupuram, dated 26th April, 1966 in M C No 112 of 1966

T S Ramaswami, for Petitioner

R. Sundaravaradan, for Respondent

Calvin Jacob, for the Public Prosecutor, for State.

The Court made the following

ORDER —This revision petition has been filed by the unsuccessful *B* party against the order of the Sub-Divisional Magistrate, Villupuram, in Miscellaneous Case No. 112 of 1966, declaring that the first respondent and the other villagers (*A* party) have a right to take dead bodies through the lands of the revision petitioner to the burial ground and forbidding the revision petitioner from interfering with the said right of the respondent and other villagers

The facts of the case are briefly these , on the report submitted by the Sub-Inspector of Police that the respondent (the revision petitioner herein) obstructed the mamool pathway running through his lands and that such obstruction was likely to lead to a breach of the peace, the *Ex-officio* First Class Magistrate passed a preliminary order calling upon the parties to file documents and affidavits and let in evidence to substantiate their claims The revision petitioner filed a written statement contending that there was no mamool pathway through the land purchased by him and that no such pathway has been demarcated in the village records He further contended that the dead bodies were being taken only along the mud road put up by the Panchayat Board The Sub-Divisional Magistrate, Villupuram, took up enquiry The respondent herein filed 14 affidavits and examined one Munnuswamy Gounder in Court as P W 1 The revision petitioner herein filed Exhibits D-1 to D-4 and 29 affidavits , but he did not examine any witness The learned Sub-Divisional Magistrate perused the affidavits filed by both the parties and ultimately found that there was a pathway in the land of the revision petitioner through which the villagers used to take the dead bodies to the burial ground and declared that the respondents have a right to take the dead bodies through the lands of the revision petitioner

The only point that has been raised in this case by the revision petitioner is that the learned Sub-Divisional Magistrate was in error in receiving the affidavits and passing an order on the basis of those affidavits without hearing the parties and

* Crl R.C No. 656 of 1966 and Crl. R P No 649 of 1966 6th March, 1968.

receiving evidence which might be produced by the parties and without considering the effect of such evidence There appears to be some force in this contention. The order of the learned Sub-Divisional Magistrate is very much based upon the affidavits received by him

Section 147 (1-A), Criminal Procedure Code, is in the following terms :

" The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether such right exists and the provisions of section 145 shall, as far as may be, applicable in the case of such enquiry "

This section makes it clear that the Magistrate can receive evidence and act upon such evidence whereas section 145 (1), Criminal Procedure Code, provides for filing affidavits Under section 145 (4), Criminal Procedure Code, the Magistrate can peruse the affidavits In contradistinction to section 145 (1) and (4), Criminal Procedure Code, section 147 (1-A), Criminal Procedure Code, does not give power to the Magistrate to receive affidavits and consider such affidavits: but he can only receive evidence and consider the same

In *Jayarama Mudaliar* v. *Bhoomi Ammal*[1], Ananthanarayanan, J , as he then was held :

" In deciding a question of a dispute concerning user of immovable property under section 147 of the Criminal Procedure Code it is not open to the Magistrate to receive and act upon the evidence on affidavits Though section 145 (1) makes specific provision that the parties should be called upon to adduce evidence by affidavits, section 147 (1-A) is in different terms that the Magistrate shall receive all such evidence as may be produced by the respective parties "

I agree with the above decision Another point that was raised by the revision petitioner was that the order of the learned Magistrate declaring that the villagers as a whole are entitled to carry the dead bodies through his lands, cannot be sustained for the reason that they were not parties to the proceedings I do not think there is any substance in this contention We find in this case that at least 14 villagers have filed affidavits. The right of usage of the pathway is of such a nature that the entire public will be interested in carryingt he dead bodies On the view that I am taking, in this case, it may not be necessary to consider this point at this stage.

The order of the Sub-Divisional Magistrate is quashed ; but the entire proceedings are remitted to the Sub-Divisional Magistrate for disposal according to law The Magistrate must now hear the evidence adduced by the parties, if any, and any additional evidence that the Court may require to take. In taking up the proceedings again, the Magistrate also must find out whether breach of the peace exists and, if necessary, should call for a report from the police concerned

The petition is allowed with the above observations

V K. *Petition allowed.*

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1. (1964) 2 M.L J 481 · (1964) M.L J. (Crl) 649

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K VEERASWAMI AND MR JUSTICE T RAMAPRASADA RAO

V. P Selvaraj .. *Petitioner**

v.

V Narasimha Rao by power agent V Sethu Rao and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 14 (1) (b) *and* 16—*Landlord requiring building for demolition and reconstruction—Requirement if* bono fide—*Test —Bifurcation and compartmentalisation of* bona fides *with regard to parts of same building—Legality*

The quality and content of the expression *bona fide* appearing in the various sections of the Act and for purposes therein enumerated have to be weighed and construed in different lines under different circumstances having regard to the context in which the expression appears In cases where the claim of the landlord is not *per se* dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject of course, to the other conditions prescribed by the Act being satisfied

When section 14 (1) (*b*) is read in conjunction with and in juxtaposition to section 16 of the Act, it is very clear that the real content of the word *bona fide* appearing in this sub-section has to be understood in a limited sense In fact the safeguard provided under section 16 acts as a pivot to tilt matters one way or the other and in effect a microscopic scrutiny into the subjective content of the expression *bona fide* appearing under section 14 (1) (*b*) becomes absolutely unnecessary.

In an application under section 14 (1) (*b*) there is no scope for bifurcation of *bona fides* and compartmentaliation thereof It cannot be said that the application for demolition and reconstruction of the front portion of the building is *bona fide* and that it is not so in so far as it relates to the back portion of the same building Once it is found that the landlord has satisfied all other relevant considerations which might arises under section 14 (1) (*b*) and his claim is found to be honest and not designed for an ingenious purpose, then no option is left to the Court except to direct eviction of the tenant This is so, because the landlord is always under the grave risk of facing a claim for representation of the building or a part thereof whenever he fails in his undertaking given under section 14 (2) (*b*).

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, West Thanjavur, Thanjavur, in C M P. No 13 of 1964 C M A No 38 of 1963, Sub-Court of Kumbakonam, H C O P. No.127 of 1962, Rent Controller—District Munsif, Kumbakonam.

K S Desikan and *K Raman*, for Petitioner.

M. R Narayanaswamy, for Respondents

The Judgment of the Court was delivered by

Ramaprasada Rao, J—Both the tenant and the landlord aggrieved against the legality, regularity and propriety of the order of the learned District Judge of West Thanjavur, have filed these two revision petitions, the former being the one filed by the tenant and the latter by the landlord It is unnecessary to repeat the entire facts which have been clearly stated by the learned District Judge in his order. Suffice it however to observe the relevant details

The tenant, petitioner in C R P No 112 of 1965, was occupying the premises in question in its entirety from 1956 The premises, however, contained two distinct

*C. R. P Nos 112 and 1620 of 1965 21st June, 1968

compartments, one the front portion thereof which was used for non-residential purposes, and the other the back portion which was at all times being used for residential purposes. In or about 1962, the tenant (petitioner in C. R. P. No. 112 of 1965, and respondent in C. R. P. No. 1620 of 1965) and the landlord (respondent in C. R. P. No. 112 of 1965, and petitioner C. R. P. No. 1620 of 1965) entered into an arrangement whereby the front portion which was delimited and delineated by mutual understanding, was to be demolished and reconstructed, and on such reconstruction the landlord was to re-let the same to the tenant on an increased rent. The other material portions of the arrangement between the tenant and the landlord need not be stated as it is not necessary. The tenant, in fact, advanced moneys to the landlord to enable him to demolish and reconstruct the front portion as agreed to. Indeed a mortgage, Exhibit B-1, dated 21st May, 1962, was executed for the purpose. Later, due to differences between the tenant and the landlord, the arrangement was not implemented. The landlord thereafter filed an application under section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act of 1960, hereinafter referred to as the Act, including the back portion on the ground that he required the building for demolition and reconstruction. The Rent Controller allowed the petition. The Appellate Authority, however, disagreeing with the Rent Controller, set aside the order of the Rent Controller. On revision to the learned District Judge, West Thanjavur, he was of the view that regard should be had to the anterior arrangement entered into between the landlord and the tenant and to that extent at least the *bona fides* of the landlord to demolish and reconstruct the front portion of the building is established and having regard to the difference between the provisions of sections 14 (1) (*a*) and 14 (1) (*b*), came to the conclusion that the supervening intention of the landlord in seeking eviction of the tenant from the back portion of the building appears to be oblique and lacking in *bona fides*. He ultimately came to the conclusion that in so far as the claim of the landlord to evict the tenant from the front portion of the building which was delineated and demarcated by both the parties was concerned it was well founded and *bona fide* and therefore ordered the eviction of the tenant from that portion of the building; as regards the back portion of the building, the claim of the landlord was negatived. Against this order of the learned District Judge, both the tenant and the landlord have come up in revision.

At the outset it is necessary to observe the statutory provision which enables a landlord to file an application for eviction for demolition and reconstruction of his building in the occupation of a tenant. Section 14 (1) (*b*) speaking of recovery of possession by a landlord for reconstruction, provides that on an application made by a landlord the Controller shall, if he is satisfied that the building is *bona fide* required by the landlord for the immediate purpoe of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord, before a specified date. Sub-section (2) (*b*) of section 14 imposes a further obligation on the landlord. This sub-section provides that no order directing the tenant to deliver possession of the building under section 14 (1) (*b*) of the Act shall be passed unless the landlord gives an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date he recovers possession of the entire building or before the expiry of such further period as the Controller may allow. It is however to be noted that section 16 controls the letter and spirit of section 14 (1) (*b*) of the Act. Section 16 makes it imperative that the undertaking envisaged in section 14 (2) (*b*) of the Act shall be implemented, and in default thereof the tenant would be entitled to restoration of the possession of the building. Section 16 of the Act in terms thereof provides that where the work of demolishing any material portion of the building has not been substantially commenced by the landlord within the period of one month in accordance with his undertaking under clause (*b*) of sub-section (2) of section 14, the tenant may after following the prescribed procedure therein, reclaim the building from the landlord on an application made in that behalf. The Controller, while

dealing with such an application is mandatorily obliged to put the tenant in possession of such a building on the original terms and conditions It is in the light of such statutory provisions that the word '*bona fide*' appearing in section 14 (1) (*b*) has to be understood No doubt, the word *bona fide*' is tritely used in the Act for many purposes, and to achieve different objects. But the word '*bona fide*' in section 14 (1) (*b*) has to be understood in the context in which it is used When section 14 (1) (*b*) is read in conjunction with and in juxtaposition to section 16 of the Act it is very clear that the real content of the word '*bona fide*' appearing in this sub-section has to be understood in a limited sense and has to given effect to in the context in which it appears. While dealing with the expression '*bona fide*' Veeraswami, J., speaking for the Bench in *Nathella Sampathu Chetty* v *Sha Vajinjee Bapulal*[1], observed as follows :

"It is not in controversy before us that the conditions of section 10 (3) (*iii*) are satisfied, and, therefore, the only question is, as was rightly posed by the lower appellate Court, whether the claim of the landlord is *bona fide* This requirement that the claim of the landlord should be *bona fide* is common to not only the provision under which the petitioner applied in this case, but also to several other provisions which provide for tenant's eviction The expression, therefore, will have to be understood in the context, but subject to that, it means that for present purposes the landlord honestly desires to occupy the premises from which eviction is sought and his claim is not a device to serve an oblique purpose "

The quality and content of the expression *bona fide* appearing in the various sections of the Act and for purposes therein enumerated have to be weighed and construed in different lines under different circumstances having regard to the context in which the expression appears Section 16 of the Act affords a statutory right to the tenant to reclaim possession of a building secured by the landlord under section 14 (1) (*b*), if he does not substantially demolish the building and attempt at reconstruction as proposed This controlling provision provides as it were a key to the interpretation of the expression '*bona fide*' appearing in section 14 (1) (*b*) of the Act It appears to us that in cases where the claim of the landlord is a not *per se* dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunals constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with It is relevant at this stage to quote an excerpt from the decision of a Division Bench of this Court in *David* v *Daniel*[2] The learned Chief Justice speaking for the Bench said :—

"The only requirements of section 14 (1) (*b*) is the honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished There is nothing in the language of this clause to warrant the view that, the building should be old and decrepit. The expression '*bona fide*' occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction, so as to attract clause (*b*) of section 14 (1) The import of the section is that the desire or the intention to demolish and rebuild should be honestly entertained by the landlord It should not be a device to evict the tenant

Moreover there are sufficient safeguards in the statute itself against such device in the shape of section 14 (2) (*b*), section 16 and section 33 (3) (*b*) "

In the instant case it is not suggested that the landlord's claim for possession of the entire building is in any way oblique or dishonest or indeed designed. No doubt, there was a prior arrangement between the parties that the landlord intended to reconstruct only the front portion of the building which was being used for non-residential purposes Later on, he changed his mind and wanted to demolish the entire building including the back portion and reconstruct the same In the light

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1. (1967) 80 L W 73. 2 (1967) 1 M L J 110

of the statutory mandates and the undertaking which he is bound to give at the time when he secures an order under section 14 (1) (*b*) of the Act, it is difficult to hold that there is partial lacking of *bona fides* on the part of the landlord in so far as his claim for eviction of the tenant from the back portion of the building is concerned. *Bona fides* cannot be mutilated in the way it was sought to be done by the learned District Judge In an application under section 14 (1) (*b*), there is no scope for such bifurcation of *bona fides* and compartmentalisation thereof It cannot be said that the application for demolition and reconstruction of the front portion of the building is *bona fide* and that it is not so in so far as it relates to the back portion of the same building Once it is found that the landlord has satisfied all other relevant considerations which might arise under section 14 (1) (*b*) of the Act, and his claim is found to be honest and not designed and not for an ingenious purpose, then no option is left to the Court except to direct eviction of the tenant This is so, because the landlord is always under the grave risk of facing a claim for repossession of the building or part thereof whenever he fails in his undertaking as contemplated in sub-section (2) of section 14 resulting in the tenant securing a redelivery of the building or part thereof secured by the landlord pursuant to the orders passed by the Controller under section 14 (1) (*b*) This safeguard acts as a pivot to tilt matters one way or the other and in effect a microscopic scrutiny into the subjective content of the expression '*bona fide*' appearing under section 14 (1) (*b*) becomes absolutely unnecessary.

In view of the finding of the learned District Judge that the landlord's requirement of the front portion of the building is *bona fide* justified, we are of the view that his conclusion that the petition has to be dismissed insofar as it relates to the back portion of the building is not well-founded In our view the order of the learned District Judge is neither legal, regular or proper It is therefore set aside In the result C R P. No 112 of 1965 is dismissed and C R P No. 1620 of 1965 allowed. There will however be no order as to costs. The petitioner in C R P No. 112 of 1965 is granted four months time from to-day to vacate and surrender possession to the landlord of the entire building

V K — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE A. ALAGIRISWAMI.

V.R. Sonai and another .. *Appellants**

v.

Chinniah Konar ... *Respondent*

Stamp Act (II of 1899), section 19—Scope—Promissory note executed and endorsed outside India—Suit in India on the basis of—Requirement of section 19 if should be complied with

Negotiable Instruments Act (XXVI of 1881), sections 11 and 12—Scope.

When a suit is filed on a promissory note executed as well as endorsed outside India, it need not be stamped as required under section 19 of the Stamp Act.

Sections 11 and 12 of the Negotiable Instruments Act which deal with the definition of inland instrument and foreign instrument are purely for the purpose of that Act and it cannot have any relevance for deciding the question whether, when a suit is instituted in India on a promissory note executed and endorsed in Singapore outside India the Singapore Money Lenders Act would apply or not.

Appeal against the orders of remand made by the Sub-Court, Sivaganga in A.S. Nos 32 and 33 of 1967—O S Nos 395 and 424 of 1964, Dt Munsif Court of Sivaganga

R. Muthukumaraswami, for Appellant

K. Gopalachari, for Respondent.

* A.A O. Nos. 48 and 49 of 1968 26th June, 1968.

The Court made the following

ORDER.—Two common questions of law arise in these two cases The appellants in both these cases executed promissory notes in Singapore stamped with Indian stamp. The instruments were endorsed in favour of the respondent in these two cases in Singapore On suits being filed in India on the basis of these two promissory notes, the defendants contended that the suit promissory notes had not been properly stamped as required by section 19 of the Indian Stamp Act. They also contended they were foreign instruments and, having been executed in Singapore, the Singapore Money-lenders Act would apply and therefore no suit could be laid on them The learned District Munsif who tried these suits accepted the contention of the defendants and dismissed the suits The learned Subordinate Judge, who heard the appeals, has taken a contrary view on both the points, allowed the appeals and remanded the suits for fresh disposal. Hence these two Civil Miscellaneous Appeals.

I am satisfied that the conclusion of the lower appellate Court is correct. Section 19 of the Stamp Act reads thus :

> "The first holder in India of any bill of exchange, payable otherwise than on demand or promissory note drawn or made out of India shall, before he presents the same for acceptance or payment, or endorses, transfers or otherwise negotiates the same in India, affix thereto the proper stamp and cancel the same ;
>
> Provided that.........................."

In this case, the suits were filed on the basis of the promissory notes They have not been presented for acceptance or payment Nor have they been endorsed or transferred or otherwise negotiated in India. There is, therefore, no need for affixing proper stamp and cancelling the same That, when a suit is filed on a promissory note executed as well as endorsed outside India, it need not be stamped as required under section 19 has been held as early as 1898 in *Simulu Ebrahim Rowthen* v. *Abdul Rahiman Mohamad*[1]. The decision in *Sivasubramania Thavan* v. *Kolankaraya Konar*[2], merely held that in a case of assignment or transfer of a promissory note drawn or made outside British India, the first holder in British India must affix a proper stamp and cancel the same and the affixing of the stamp and its cancellation must be done before the process of transfer began in British India In this case, we are not concerned with a case of transfer in India The further point whether, where a promissory note has been executed abroad but has been stamped there according to the law in India, it should or should not be stamped again when it is brought into India and submitted to any of the processes referred to under section 19 of the Stamp Act does not really arise in this case There is the decision of this Court in *Lobo* v *Narajal Dogg*[3], which seems to take the view that it would be necessary in such a case to affix stamps again afresh even if it had been affixed under the Indian Stamp Act when it had been executed out of India. That question does not arise in this case and need not be considered

The next point is whether it is an inland instrument or a foreign instrument. I think that question does not arise at all on the facts of this case. Sections 11 and 12 of the Negotiable Instruments Act which deal with the definition of inland instrument and foreign instrument are purely for the purpose of that Act and it cannot have any relevance for deciding the question whether, when a suit is instituted in India on a promissory note executed and endorsed in Singapore outside India the Singapore Money-lenders Act would apply or not It appears to me, therefore, that the Courts below have unnecessarily gone into the question whether the instruments in question in this case are inland instruments or foreign instruments But whether, because of the Singapore Money-lenders Act, the suits can be maintained or not is a different point which has got to be decided upon different considerations. That question may be gone into by the trial Court without reference to what the lower appellate Court has decided in this case

With these observations, the two appeals are dismissed. No costs.

V K ——— *Appeals dismissed.*

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1 (1898) 8 M L J 182

2 (1941) 2 M.L J 301

3 (1952) 2 M L J 747.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE P. RAMAKRISHNAN

Coimbatore District Co-operative Central Bank Employees Association, Coimbatore-9, represented by the Secretary *Petitioner**

v.

The Industrial Tribunal, Madras and another *Respondents*

Industrial Dispute—Bonus—Madras Co-operative Societies Act (VI of 1932), *Bye-law No* 28 *—Co-operative Bank—Award of bonus—Ceiling limit of three months' pay—Limit would govern industrial adjudication—No power in the Tribunal to award in excess of such statutory limit—Payment of Bonus Act (XXI of* 1965)*—Applicability*

For the year 1962-63, two months' pay was given as bonus to the employees of the Co-operative Bank, as allowed under bye-law No 28 framed under the Madras Co-operative Societies Act, 1932 The employees claimed bonus on the basis of the Labour Appellate Tribunal's formula The Industrial Tribunal, dealing with the reference on the question of an additional bonus to such employees, held that the bonus should be increased to three months' pay (the maximum allowed under the bye-law No 28) The employees applied under Article 226 of the Constitution to quash the award

Held, while in the Madras Co-operative Societies Act of 1932 there is no statutory obligation to provide for bonus, the bye-laws framed under the Act restrict the computation of bonus, if it is to be awarded, by limiting it to a ceiling of three months' pay The bye-laws form an integral part of the constitution of a Co-operative Society and the society is bound to act up to the bye-laws Any act not in conformity with the bye-laws would imperil the very life of the society and expose it to the risks of supersession and its directors to the risk of a surcharge It is not open to the Industrial Tribunal to ignore the statute or rules and the bye-laws framed under it

The unreported decision of the Supreme Court in Civil Appeal No 1630 of 1967 holding that after the statute provided in the Bonus Act for the computation and award of bonus as an essential obligation, it is the provision of that Act that should be applied for the calculation of bonus and not the general industrial principles laid down by the Labour Appellate Tribunal's formula, referred to

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records from the 1st respondent in I D No 3 of 1965 on its file and quash the Award passed therein dated 1st April, 1965

G Venkataraman for *M/s. Aiyar* and *Dolia* and *Ambrishkumar*, for Petitioner

M R Narayanaswami and *D. Meenakshisundaram*, for 2nd Respondent.

The Court made the following

ORDER —This writ petition is filed by the Coimbatore District Co-operative Central Bank Employees Association represented by the Secretary, for the issue of a writ of *certiorari* quashing the award of the Industrial Tribunal, Madras (Sri S. Ganapatia Pillai) in I D No 3 of 1965 The Industrial Tribunal was called upon, on a reference by the Government of Madras under section 10 of the Industrial Disputes Act, to decide the issue whether the demand of the workers, who are the employees of the Coimbatore District Co-operative Central Bank, for additional bonus for the year 1962-63 was justified, and, if so, to fix the quantum It would appear that for the year in question, the Board of Directors of the Bank distributed the net profits in accordance with the bye-laws and rules under the Madras

* W P. No. 4422 of 1965 23rd August, 1968.

Co-operative Societies Act, 1932, which was the Act in force for the period The Madras Co-operative Societies Act, 1961 came into force only subsequently, that is from 1st October, 1963 The relevant bye-law, bye-law No 28 permitted the award of bonus only upto a ceiling of three months pay The Board of Directors took into consideration the available balance and granted two months' pay as bonus, after getting the approval of the Registrar of Co-operative Societies The employees, however, made a claim that on the basis of the Labour Appellate Tribunal's formula, and taking also the need to bridge the gap between a living wage and the actual wage, a bonus calculated at five to six months basic pay would be justified in the case. In the view of the Industrial Tribunal the employees of the bank are governed by the rules and bye-laws framed under the authority of the statute, and it is necessary, therefore, to respect the ceiling of three months for award of bonus Thereafter taking into account the available surplus and also the fact that the existing scales of pay of the staff in the bank are comparatively low scales and also having regard to the high cost of living, the Industrial Tribunal held that the claim for bonus should be increased to three months basic pay Against the above award the Worker's Union has filed this writ petition

The main contention urged on behalf of the Workers' Union is that, when the dispute has been brought before the Industrial Tribunal, that Tribunal for the purpose of deciding about the quantum of bonus, need not be fettered by the maximum or ceiling, which the bye-laws have provided for the award of bonus The Industrial Tribunal having in mind the paramount need of ensuring to the employees a due share in the profits, which they have helped to earn, and also bearing in mind the need to give them an allowance commensurate with the high cost of living should have applied the Labour Appellate Tribunal's formula and awarded the bonus at a high rate On the other hand the Management contended before me that, where there is a statutory limitation, as in this case, to the computation of bonus, the Industrial Tribunal cannot overstep that limit.

I am inclined to agree with the arguments put forward by the Management in this case I have already mentioned that the relevant Act which governed the affairs of the bank in 1962-63, was the Co-operative Societies Act of 1932 Unlike the Act of 1961, which in section 62 gave precise directions for the disposal of the net profits, and also contained a provision for the payment of bonus to members and paid employees at such rate and subject to such conditions as may be specified in the rules, the main body of the Act of 1932 contained no similar provision But Rule XII (*a*) framed under section 65 of the 1932 Act, which has statutory force, provided for the manner in which the net profits should be distributed in a financing Bank with shares and limited liability (the District Co-operative Central Bank in the present case falls in this category) Not less than one-third of the net profits shall be carried to the reserve fund until the total of the reserve fund and the other reserves of the bank equals the paid up share capital of the members held by it and thereafter not less than one-quarter of the profits shall be so carried, ten per cent of the net profit should be set apart to an audit fund ; the remainder of the net profits may be used in such manner and for such purposes as are prescribed by the bye-laws of the society Now, Rule II of the Rules framed under the 1932 Act lays stress on the fact that the bye-laws of a society should contain provisions for the disposal of the net profits The bye-laws shall be consistent with the Co-operative Societies Act and the rules made by the Government thereunder. A draft copy of the bye-laws shall be submitted with every application for registration Rule III says that after the Registrar has examined the application and the bye-laws and satisfied himself that they are in conformity with the Act and the rules and that they are suitable for carrying out the objects of the society he is empowered to register the society and its bye-laws and grant to the society a certificate of registration The above provisions show that the bye-laws form an integral part of the constitution of a Co-operative Society, and the Co-operative Society is bound to act up to the bye-laws Any act not in conformity with the bye-laws would imperil the very life of the society and expose it to the risks of supersession and its Directors to the risk of a

surcharge. In the context of this peremptory obligation which the Society has to discharge, if it ignores the bye-laws including the bye-law about the ceiling for computation of bonus, it will do so at its peril. It is idle to contend that the Tribunal exercising jurisdiction under industrial adjudication can permit the Society, or the bank as in this case, to do what its own bye-laws as well as the Act under which it is constituted prohibits it from doing.

This well recognised principle that industrial adjudication while dealing with the question of bonus, if it is subject to particular statutory laws and restrictions in the case of particular types of management of industries will have to respect them. The decisions which were cited in this connection before me go to confirm this position In *The Central Bank of India* v. *Their workmen*[1], it was held that the provision in the Banking Companies Act, 1959, which stated, "No banking company shall employ any person whose remuneration or part of whose remuneration takes the form . of a share in the profits of the company," would disentitle the bank employees to bonus, even if it is raised as an industrial dispute Per contra the Counsel for the petitioner drew my attention to a decision of the Supreme Court in *Tinnevelly-Tuticorin Electric Supply Company Limited* v *Its Workmen*[2] In that case the Supreme Court had to deal with the provisions of the Electric Supply Act intended for the control of rates chargeable to consumers and for that purpose the Act required the electricity companies to prepare a working sheet, which was essentially different from the balance-sheet and profit and loss account, which the companies are required to keep under the Companies Act The determination of clear profits on the basis of the working sheet proceeded on the consideration of previous losses, contributions towards the arrears of depreciation and several appropriations authorized by the State Government, matters which, however, had no relevance to commercial accounting It was urged that in view of these statutory provisions, principles different from those laid down by the Labour Appellate Tribunal Full Bench should be applied for deciding the quantum of bonus The Supreme Court held that the Act, which made detailed provisions in respect of matters intended to be covered by it, would not stand in the way of claim to bonus being decided in the light of the relevant industrial principles including the Labour Appellate Tribunal Full Bench formula It is clear that in that case there was no upper limit to the computation of bonus prescribed by a binding provision like the provision in the bye-law in this case , nor was there a total prohibition as in the case of the earlier Banking Companies Act It was in such circumstances that the Supreme Court recognised the advisability of settling the quantum of bonus on broad industrial principles as laid down by the Labour Appellate Tribunal formula

It is pointed out by the learned Counsel for the Management that for the subsequent accounting year 1964 and later years, the principles laid down in the Bonus Act will acquire statutory force The Supreme Court in a recent unreported decision in Civil Appeal No 1630 of 1967 has laid down that after the statute had thus provided in the Bonus Act for the computation and award of bonus as an essential obligation, it is the provision of that Act that should be applied for the calculation of bonus and not the general industrial principles laid down by the Labour Appellate Tribunal's formula While in the case of 1932 Co-operative Societies Act there is no statutory obligation to provide for bonus as in the Provident Funds Act, the bye-laws framed under this Act restrict the computation of bonus if it is to be awarded, by limiting it to a ceiling of three month's pay. The statute was in force only to the limited extent as stated above in regard to the upper limit But where it is in force to the limited extent stated above, it is not open to the Industrial Tribunal to ignore the statute or the rules and the bye-laws framed under it The writ petition is dismissed No order as to costs.

V S *Petition dismissed.*

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1 (1960) S C J 842 (1960) 1 S C R 200 (1960) 1 L L J 275
2 (1960) S C J 734 (1960) 3 S C R 68 :

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. M. ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M NATESAN

G Savarinathan .. *Appellant**

v.

The Director of Postal Services, Madras, and others *Respondents*

Fundamental Rules, rule 56 (*j*)—*Civil servant—Retirement on reaching fifty-five years—Termination by authority* bona fide *in the public interest—Jurisdiction of High Court under Article* 226 *of the Constitution to interfere*

Constitution of India (1950), *Article* 311.

Under Fundamental Rule 56 (*j*), the concerned authority, on the basis of relevant material on the files, came to the *bona fide* conclusion that the Officer should be retired in the public interest on his attaining the age of fifty-five years.

In the exercise of jurisdiction under Article 226 of the Constitution, it will not be the function of the High Court to canvass the adequacy of that material, or the extent to which it is credible, particularly where the right to retire is not being imposed in the form of a punishment, but in the form of an option given to the authority under the statutory rules

Since the implied covenant or the conditions of service under which the Officer entered the department and served till he was fifty-five years of age, can only be taken to mean that a Government servant should retire at, fiftyfive, and the extension of service upto sixty was very recent, the officer cannot say that if he is retired under rule 56 (*j*) ,that constitutes a punishment within the rigour of Article 311 of the Constitution

Appeal under Clause 15 of the Letters Patent against the Order of The Honourable Mr Justice Kailasam, dated 13th March, 1968 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 3060 of 1967 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the precedings compulsorily retiring the petitioner connected with the orders of (1) the Director of Postal Services dated 7th August, 1965 STA/36-60/62 (ii) The Postmaster-General, dated 25th April, 1966 STA/34/-60/62 (iii) The Director-General mentioned in communication of the Superintendent, Foreign Post, dated 20th March, 1967, B-28-1 and quash the said proceedings

V. Rajagopalachari and *T. L Nagaraja Rao*, for Appellant

S Govindaswaminathan, Standing Counsel for Central Government, for Respondents

The Judgment of the Court was delivered by

Anantanarayanan, C J—Though this writ appeal relates to a considerable area of facts traversed in Writ Petition No 3060 of 1967, which was dealt with by Kailasam, J , the point now before us is a very short one The writ petitioner was an Assistant Superintendent of the Postal Department at Madras, and he was compulsorily retired from service under certain rules Admittedly, he was originally in the clerical cadre for some years, and later he became a gazetted officer of the Department.

It is common ground between the Department and the writ appellant, represented by Sri V Rajagopalachari, that the Department now seeks to rely on the notification No 2350, dated 21st July, 1965 constituting the Sixth Amendment to the Fundamental Rules These relate to the age at which such Government servants are due to retire, and the circumstances under which they might be permitted to serve beyond that age The relevant part of the rules is the amendment to Fundamental Rule 56 (*c*), under which, a Government servant, who entered the

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*W P No 168 of 1968 6th September, 1968.

service prior to 31st March, 1938, "shall be retained in service till the day he attains the age of sixty years" If this rule is to apply, the writ petitioner will certainly be entitled to continue in service till his sixtieth year, and, any order prematurally retiring him before that date, may not be in accordance with the rules.

But the rules have to read as a whole, and an exception has been statutorily framed with regard to this very rule That is not disputed by Sri Rajagopalachari for the writ appellant The exception is in the following terms .

> "(j) Notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of not less than three months in writing."

It appears to us to be indisputable that, since the implied covenant or the conditions of services, under which this appellant entered the Department and served till he was fifty-five years of age, can only be taken to mean that a Government servant should retire at fifty-five, and this extension of service upto sixty was very recent, the concerned writ appellant cannot say that if he is retired under sub-clause (j), which we have referred to, that constitutes a punishment which is within the rigour of the Article 311 of the Constitution of India. So the only point before us is, whether there was a valid retirement of this Government servant by the concerned Authority, acting under rule 56 (j), or otherwise ?

On this aspect, learned Counsel states that there were proceedings against the Government servant with regard to a claim for house-rent made by him, but that these proceedings did not and in disciplinary action, there was certain amount held in challenge or doubt by the authority and the Government servant thought it expedient to pay this amount without further protest There were no departmental proceedings, as such, with regard to this matter and no punishment was imposed. Hence, it is contended that if the only material, on which the Authority came to the conclusion that it was not in the public interest to continue this officer in service, consisted of the material relating to payment of house rents improperly made, or payment of such rents not made, then rule 56 (j) itself would not have been duly complied with, and there would be room for the exercise of our jurisdiction, as this is an error vitiating the order of retirement.

Naturally enough, the same arguments were addressed before the learned Judge, and it was stressed that, in the counter-affidavit, the Authority expressly disclaimed material relating to irregular claims regarding house rent or non-payment of such rent, as the basis for the retirement Learned Counsel for the appellant (Sri V Rajagopalachari) sought to contend before us, that there could not have been any other basis The learned Judge applied his mind to the matter, and looked into the relevant files. He was satisfied that the concerned Authority came to the *bona fide* conclusion that the Officer should be retired in the public interest, and that there was relevant material in the files to support the conclusion As is well-known, in the exercise of jurisdiction under Article 226, it will not be the function of the Court to canvass the adequacy of that material, or the extent to which it is credible particularly where the right to retire is not being imposed in the form of a punishment, but in the form of an option given to the authority under the statutory rules So long as there is a conclusion arrived at by an authority *bona fide*, and it is supported by some material, the character of that material, and the degree of its adequacy, cannot be canvassed in writ jurisdiction.

We have also looked into the files, and we are satisfied that there was some other material, apparently of a far more serious character than mere irregular claims relating to rents or non-payments of rent, which would constitute only an audit objection, which formed the basis of that order There is definite reference to investigation by the Vigilance Authority, and we may certainly take notice of the fact that such investigation would relate to averments or complaints whether ill-founded or well-founded, of corruption, and not merely any procedural irregularity.

It seems to be true that this material did not eventuate into any specific proceedings against the concerned Officer Probably, it was never disclosed to him, but that does not mean that, on such material before it, the Authority cannot *bona fide* arrive at the conclusion that the public interest did require the retirement of the concerned Government servant, under sub-rule (j)

Under the circumstances, we see no grounds for interference and the writ appeal is dismissed

V.S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT .—MR JUSTICE K SRINIVASAN

S. Pachiappa Mudaliar, Proprietor, Lakshmi S P S Vilas, Tindivanam *Petitioner**

v

The State Transport Appellate Tribunal, Madras and another *Respondents.*

Motor Vehicles Act (IV of 1939), section 44 (2)—Chairman, Regional Transport Authority—Appointment of—Requirement of judicial experience—Appointment of an officer of the Indian Administrative Service—If infringes section 44 (2)

Motor Vehicles Act (IV of 1939), section 60—Offence of overloading—Suspension of permit—Regional Transport Authority accepting the statement of the Checking Officer, but rejecting the explanation of the operator—Order of suspension, if sustainable

It is no doubt true that the Regional Transport Officer could have obtained the signatures of one or the other of the passengers when he found the bus overloaded, but that he failed to do so does not discount the veracity of his report in any way The fact that the trip-sheet was taken possession of by the Checking Officer is positive proof that the vehicle was checked at that time and on that day As against this, the operator's claim that there was no overload is based upon what was told by the driver and the conductor and by the two persons who were put forward as passengers in the bus at the time The authorities below chose to accept the statement of the Checking Officer The material consisting of the check report and the explanation of the operator is sufficient to enable the enquiring authority, the Regional Transport Authority, to reach a conclusion with regard to the matter. In the absence of any charge of ill-will towards the operator, the Checking Officer's statement is entitled to acceptance

It is true that section 44 (2) of the Motor Vehicles Act requires that the Regional Transport Authority shall consist of a Chairman, who has judicial experience, and such other official and non-officials, not being less than two. But the appointment of an officer of the Indian Administrative Service as the Regional Transport Authority does not infringe the section

In the case, the Regional Transport Authority who has the power to cancel or suspend the permit contemplated by section 60 of the Motor Vehicles Act, rightly imposed the suspension on finding the offence of overloading established

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings of the Regionl Transport Authority, South Arcot, in R No A-3/4182664, dated 30th March, 1965 and confirmed in Appeal No 232 of 1965, dated 31st July, 1965 of the State Transport Appellate Tribunal, Madras and quash both the orders

S. Harihara Ramachandran and *K Thirumalai*, for Petitioner

J. Kanakaraj, for the Government Pleader, for Respondent

The Court made the following

ORDER —Bus P -2739 was found to be overloaded by two passengers at the time it was checked by the Regional Transport Officer on 8th November, 1964 When

*W P No 64 of 1966 8th October, 1968.

the explanation of the permit-holder was called for, he only stated that the checking officer had not obtained the signatures of the conductor and the driver on the check report, nor did he obtain the signatures from the passengers who travelled in the bus. The operator further stated that he was told by the driver and the conductor that there was no overload. He claimed further that he had ascertained from the passengers who travelled in the bus that there was no overload and he produced affidavits from two alleged passengers signed by them on 29th December, 1964 and 30th December, 1964 The Regional Transport Authority, who dealt with the matter was not prepared to accept the explanation, He found the offence of overloading established, and suspended the permit for one day The operator appealed to the State Transport Appellate Tribunal, who confirmed the order These orders are attacked in this writ petition

I am really unable to find any substance in the contentions put forward on behalf of the petitioner It was stated by the learned Counsel that the checking officer had not made a contemporaneous record, which would establish that the driver and the conductor had refused to sign the check report. I find from the records of the case, however, that even in the body of the report of the checking officer, it was clearly stated that after he drew up the check report, the conductor and the driver refused to sign it, saying that there was no overload, but that he had entered the bus and counted the passengers himself and there was absolutely no uncertainty about the overloading He also secured the trip-sheet maintained by the stage-carriage and endorsed upon the trip-sheet that he checked and found 53 passengers instead of the seating capacity of 51, and that the conductor and the driver refused to sign the check report It is no doubt true that he could have obtained the signatures of one or the other of the passengers, but that he failed to do so does not discount the veracity of his report in any way The fact that the trip-sheet was taken possession of by the checking officer is positive proof that the vehicle was checked at that time and on that day As against this, the operator's claim that there was no overload is based upon what he was told by the driver and the conductor and by two persons who were put forward as passengers in the bus at the time. The authorities below chose to accept the statement of the checking officer

It is urged that this is in the nature of a quasi-criminal proceeding and that when once some doubt has been cast upon the question whether there was an overload or not, the Regional Transport Authority should have held an enquiry. I am not aware that any decision has stated that in cases such as this, an enquiry comprising of the examination of witnesses on either side should be embarked upon. The operator only persisted in his denial and nothing more It is noteworthy that he did not produce any affidavit from the driver or the conductor, for there is nothing to show that the persons from whom affidavits have been produced were really passengers in the bus The material consisting of the check report and the explanation of the operator is sufficient to enable the enquiring authority, the Regional Transport Authority, to reach a conclusion with regard to the matter I am not satisfied that an enquiry was called for in the circumstances of the case Indeed, as the State Transport Appellate Tribunal points out, the operator does not charge the checking officer with any ill-will towards him which induced him to make a false report. In the absence of any such allegation, the checking officer's statement is entitled to acceptance.

It was urged that the Regional Transport Authority is not a judicial officer. Section 44 (2) of the Motor Vehicles Act has been referred to, which requires that the Regional Transport Authority shall consist of a Chairman, who has judicial experience, and such other officials and non-officials, not being less than two By a proviso, the Regional Transport Authority may consist of a single official, if the State Government thinks fit. It is urged that the Regional Transport Authority in this case being only an officer of the Indian Administrative Service is not a person who can be said to have judicial experience, and that section 44 (2) requires that even if the Regional Transport Authority is to consist of a single official, that officer should be one who has had judicial experience. This question has been considered

by me in *Sri Narayan Motor Service* v *Ram Popular Motor Service and two others*[1] where I held that the appointment of an officer of the Indian Administrative Service as the Regional Transport Authority does not infringe the section This point accordingly fails.

Nextly it was urged that the Regional Transport Authority acting under rule 134-A (11) of the Motor Vehicle Rules delegated the power to suspend a permit to the Secretary of the Regional Transport Authority and that thereafter he could not himself make an order of suspension Rule 134-A (11) has been struck down by a Bench of this Court in *Batcha Saheb* v. *Secretary, Regional Transport Authority, North Arcot* [2] The argument that the Regional Transport Authority having delegated the power of suspension can no longer exercise it must necessarily fail, because the delegation itself has been found to be invalid. That would accordingly leave the entire power to cancel or suspend the permit contemplated by section 60 of the Motor Vehicles Act in the hands of the Regional Transport Authority, and in this case, it is the Regional Transport Authority, who enquired into the matter that has imposed the suspension on finding the offence of overloading established.

The points urged against the orders fail The petition is accordingly dismissed There will be no order as to costs.

V.M.K. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE P. RAMAKRISHNAN.

Messrs. Lala Gopikrishna Gokuldass Agencies, Madras .. *Petitioner**

v.

The Assistant Collector of Customs, Appraising Dept. (Group) II, Customs House, Madras-1 .. *Respondent.*

Customs Act (LII of 1962)—Assistant Collector of Customs when levying customs duty acts quasi-judicially—Cannot be influenced by administrative instructions from Board of Revenue

The Assistant Collector of Customs as well as the other authorities who are empowered to hear appeals as well as revisions under the Customs Act were exercising quasi-judicial powers when they levy customs duty on the goods imported by an importer They will have to arrive at an independent judgment regarding the correct item of the Schedule which will apply to a given article and in the exercise of such judgment they cannot be influenced by administrative directions issued by the Central Board of Revenue

Orient Paper Mills Ltd v *Union of India*, (1969) 1 S C J. 110, referred to

Petition under Article 226 of the Constitution praying the High Court to issue writ of *certiorari* calling for records in section 23/2351/1887, dated 25th November, 1965, etc on the file of the respondent and quash the same.

V. K. Thiruvenkatachari and *A R Ramanathan*, for Petitioner.

Habibulla Basha, for Central Government Standing Counsel, for Respondent.

The Court made the following

ORDER —The petitioner in this writ petition under Article 226 of the Constitution imported in three consignments in 1963 items of ball and roller bearing of more than 51 mm bore diameter Bills of entry therefor were presented to the respondents, the Assistant Collector of Customs, Appraising department in the Customs House, Madras on 14th June, 1963 and 10th September, 1963 The respondent assessed the petitioner to customs duty provisionally on those items on 20th August, 1963 and 11th October, 1963, on the footing that the ball and roller bearings

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1 W P No 2336 of 1965 2 W A No 202 of 1966, etc

*W P No 25 of 1966 15th November, 1968

fell under item 72 (38) of the First Schedule of the Indian Customs Tariff. The above item refers to

"ball and roller bearings for use with shafting of more than 51 mm. diameter and adapter bearings not otherwise specified, which are specially designed for use exclusively with power-driven machinery and parts of such bearings not otherwise specified "

At the same time, the respondent took an indemnity bond from the petitioner for a value of Rs 25,000, towards any possible difference in the value of the goods imported The petitioner thereafter took delivery of the goods and sold them to parties

In the meantime, relying on an administrative direction issued by the Central Board of Revenue, New Delhi, on 18th November, 1963, the Collector of Customs, Madras, issued public notice No 173/64 on 14th September, 1964, regarding the assessment of rates of import duty on ball bearings Under that circular, ball bearings above 51 mm bore diameter should be assessed under item 75 (12) of the First Schedule to the Indian Customs Tariff That item deals with

"articles other than rubber tyres and tubes, batteries and such other components as are specified in items 72 (35), 75 (9), 75 (10), 75 (11), 75 (14), 75 (15), 75 (16) and 75 (18-b) (ii) adapted for use as parts and accessories of motor vehicles other than motor cycles and motor scooters".

The petitioner alleges that relying upon this administrative circular, the respondent revised the assessment of duty in respect of the aforesaid goods, classifying them under item 75 (12) and levying a higher percentage of duty at 55% as against the 11% earlier levied The authorities asked him to pay the difference which came to a sum of Rs. 35,710 and odd.

For attacking this levy, it is first of all urged by the learned Counsel appearing for the petitioner, in this writ petition, Sri V. K Thiruvenkatachari, that the Assistant Collector of Customs as well as the other authorities who are empowered to hear appeals as well as revisions under the Customs Act are exercising quasi-judicial powers when they levy customs duty on the goods imported by an importer. They will have to arrive at an independent judgment regarding the correct item of the Schedule which will apply to a given article and in the exercise of such a judgment they cannot be influenced by administrative directions issued by the Central Board of Revenue. It is urged that in this case, what induced the respondent to change the earlier classification made during the provisional assessment to the later classification, was the intervening direction from the Central Board of Revenue issued on 18th November, 1963, subsequent to the provisional assessment. The Supreme Court in its decision in *Orient Paper Mills Ltd* v. *The Union of India*,[1] expressly deprecated such a practice and held that any decision affected by such an administrative direction is vitiated The Supreme Court observed :

"That apart, we are clearly of the opinion that even if the question of the legality of the direction issued by the Board (Central Board of Revenue) had not been taken before the authorities under the Act (Customs Act) as that direction completely vitiates the proceedings and makes a mockery of the judicial process, we think we ought to consider the legality of that direction For the reason already mentioned we hold that that direction was invalid and the same has vitiated the proceedings before the Collector as well as the Government."

In the present case, the respondent does not deny the fact that the circular of the Central Board of Revenue influenced the decision In fact, in a letter dated 22nd September, 1965, the respondent has written to the petitioner saying .

"You are informed that as per the recent orders of the Government of India, Tariff Rulings, though issued after the provisional assessment of the bills of entry have to be applied at the time of finanalising them Accordingly, the Tariff ruling incorporated in P W No. 173 of 1964 has been applied to the subject cases while finally assessing them "

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1. (1969) 1 S.C.J 110 at page 115.

Learned Counsel appearing for the respondent urged that the Supreme Court decision has reference to the orders of the Collector in Appeal under section 128 and of the Government at the stage of the further revision, and that only the authorities at the above stages are required to act in a quasi-judicial manner, but the same requirement may not apply to the initial assessing authority, *viz.*, the Assistant Collector of Customs I find that the Customs Act does not make any such distinction about the different stages Whether it is before the original assessing authority or before the appellate authority or the revisional authority the question for consideration is as to the proper way in which a subject has to be assessed by the authorities charged with the duty of assessment, after applying the relevant provision of the statute to the individual cases, and at all these stages they are exercising quasi-judicial powers Therefore, the Supreme Court decision will apply equally to the assessment before the first authority, *viz*, the Assistant Collector of Customs. Therefore on this preliminary ground of objection itself, the present order of the respondent cannot be sustained and that authority has to reconsider the case of the petitioner's imports independent of the Central Board of Revenue's directions, and using his own individual judgment

Before parting with the case, I will refer to the other contention raised by the learned Counsel for the petitioner. It is not that the provisional assessment must be deemed as complete so far as the proper classification is concerned, the bond being taken only for the purpose of verifying the invoices for determining the correct value of the imported articles Therefore, the subsequent assessment, though, classed as final assessment, is only a review of the earlier completed assessment and the provisions of the Customs Act relating to review of earlier decisions, should be satisfied before a revised assessment could be validly made In view of my decision to set aside the assessment on the first point, it is not necessary to give a decision in this writ petition on the second point. It will be for the concerned authorities to consider this question also at the time when they deal with the question of the proper assessment on the imported items

The writ petition is allowed and the order of the respondent is quashed as prayed for It will be open to the respondent to deal with the case of the petitioner afresh under the law and in accordance with the foregoing observations. No order as to costs

V K. —— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M. ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M. NATESAN.

E M. Narayanaswami .. *Appellant**

v.

T. V Chinnathambi and another *Respondents.*

Madras Panchayats Act (XXXV of 1958), *section* 25 (1)—*Disqualification of candidate—Sentenced by a criminal Court to imprisonment for offence involving moral deliquency—Prescription of qualifying or disqualifying terms—Does not amount to giving retrospective effect to Act—Five years from the date of expiration —What constitutes.*

In the elections to the Panchayat, (the ward was a three member constituency and there were five nominations) the appellant secured 308 votes and of the two other who were elected, one got 323 votes and another 316 votes and the first respondent secured 13 votes and one withdrew. On the election petition filed by the first resondent, the Election Tribunal set aside the election of the appellant on the ground of his disqualification under section 25 (1) of the Act and declared the first respondent as duly elected in the place of the appellant The appellant was convicted for an offence under section 406, Penal Code and sentenced to two months rigorous imprisonment on 10th June, 1959. After the dismissal of the revision by the High Court, the appellant entered jail on 19th August,

*W A No 175 of 1966 21st November, 1968.

1960 and after undergoing the sentence came out of jail on 3rd October, 1960, On the dismissal of the petition by the Single Judge the appellant appealed.

Held, the application of section 25 (1) of the Act to the circumstances of this case is not really to give retrospective effect of the section. The Act while conferring a right to get elected proscribes the existence, of certain facts as qualifying or disqualifying a condidate for election under the Act The fact that the Act depends, for its qualifying or disqualifying a person for election, on facts and circumstances existing at the time of its application which may have had their origin in past events or which may have been existing from a time antecedent to the coming into force of the Act, does not, properly, speaking, by itself, make the Act retrospective or retroactive in its operation

The presumption against retrospectivity of a statute is applied only to preserve an accrued or vested right To avoid the the operation of a statute on the basis of the presumption, the right affected must be a vested right in the strict sense of the expression The existence of a mere option, or of an opportunity to take advantage of rights and privileges under an existing enactment in citizens generally or any class of them, without any act done by an individual availing for himself of the option or the opportunity is not property, a right accrued or right vested.

The appellant has no vested right to get elected and the fact that he was not disqualified under the prior Act was neither here nor there

The effect of the reference back under section 25 (1) can only be, having regard to the previous words, that he shall be disqualified for election as member while undergoing the sentence and for five years from the date on which the sentence the person was undergoing expired that is 5 years from the completion of the term of imprisonment

While holding that the election of the appellant has been properly set aside the order of the election Tribunal declaring the election petitioner (who had secured only 13 votes) to be duly elected has to be quashed It follows that there is a vacancy and there will have to be fresh election.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr Justice Kailasam, dated 10th August, 1966 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2984 of 1965 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the order of the Election Court (District Munsif) of Tiruchirapalli, dated 2nd July, 1965 and made in O P No 15 of 1965 and quash the same.

M S Sethu, for Appellant.

The Government Pleader and *N Arunachalam*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J—This appeal arises out of proceedings under Article 226 of the Constitution to quash the order of the Election Tribunal (District Munsif of Tiruchirapalli) setting aside the election of the appellant held on 2nd February, 1965 under the Madras Village Panchayat Act (XXXV of 1958) to Madakkudi Panchayat. Even at the time of the nomination of the appellant on 31st January 1965 as a candidate for the election, the nomination was challenged before the Presiding Officer on the ground of his disqualification under section 25 (1) of the Act But the Presiding Officer overruled the objection and allowed the appellant to contest The appellant got elected On the Election Petition filed by the first respondent herein, a defeated candidate at the election, the Election Tribunal finding the appellant disqualified under section 25 (1) of the Act, set aside his eletion and declared the first respondent as duly elected in the place of the appellant The basis of the disqualification is a sentence of imprisonment suffered by the appellant for an offence involving moral delinquency

There is no dispute that the appellant was found guilty under section 406, Indian Penal Code, for an offence of misappropriation and convicted and sentenced to two months R I on the 10th of June, 1959. The appeal from the conviction

and sentence was dismissed on 13th July, 1959 by the District Magistrate and a revision thereon to the High Court was dismissed on 28th July, 1960 confirming the conviction and sentence The appellant had meanwhile got himself elected to the Panchayat under Act X of 1950, in June, 1959 After the dismissal of the revision by this Court, the appellant had to go to jail to undergo the sentence. He entered jail on 19th August, 1960 and after undergoing the sentence came out of jail on 3rd October, 1960.

Section 25 (1) of the Madras Village Panchayat Act XXXV of 1958 runs thus :—

> "A person who has been sentenced by a criminal Court to imprisonment for any offence involving moral delinquency (such sentence not having been reversed) shall be disqualified for election as a member while undergoing the sentence and for five years from the date of the expiration thereof."

While not disputing that the offence for which the appellant was convicted is one involving moral delinquency, two contentions are raised with reference to section 25 (1) First it is urged that Madras Act XXXV of 1958 came into force only on 2nd October, 1961, and that to apply section 25 (1) to the appellant with reference to his conviction and sentence in 1960, would be to give retrospective effect to the provision Our attention was drawn to section 16 of the Village Panchayats Act (X of 1950) which was current at the time the appellant was convicted and during the period he underwent the sentence, whereunder, for a sentence by a criminal Court to disqualify a candidate, the sentence must be transportation or imprisonment for a period of more than six months Act XXXV of 1958 has prescribed no minimum period of imprisonment and any sentence of imprisonment would disqualify the candidate It is urged that, as the new Act imposed a disability which did not exist when the conviction was suffered, the new Act XXXV of 1958 must be held to be prospective in its operation. It is submitted that every Act which attaches a new disability in respect of transactions already passed, must be presumed to be intended not to have retrospective effect.

In our view, the application of section 25 (1) to circumstances as in this case is not really to give retrospective effect to the section While there is a presumption that an Act does not render unlawful what was originally lawful, there is no scope for the application of the presumption here, particularly having regard to the clear language of section 25. The Act, while conferring a right to get elected, prescribes the existence of certain facts as qualifying or disqualifying a candidate for election under the Act The fact that the Act depends, for its qualifying or disqualifying person for election, on facts and circumstances existing at the time of its application which may have had their origin in past events, or which may have been existing from a time antecedent to the coming into force of the Act, does not, properly speaking, by itself, make the Act retrospective or retroactive in its operation. There is no question of relation back in time The presumption against retrospectivity of a statute is applied only to preserve an accrued or vested right To avoid the operation of a statute on the basis of the presumption, the right affected must be a vested right in the strict sense of the expression ' The exixtence of a mere option, or of an opportunity to take advantage of rights and privileges under an existing enactment in citizens generally or any class of them, without any act done by an individual availing for himself of the option or the opportunity is not properly, a right accrued " or ' right vested " The appellant has no vested right to get elected and the fact that he was not disqualified under the prior Act is neither here nor there. His nomination was filed under the new Act The Act prescribes its own qualifications and disqualifications for the members. Retrospective operation, properly so described of an Act, is one matter, modifying or affecting rights provided for by an existing statute on certain events, which rights have not been availed of and vested in an individual, the requisite events not happening before the new Act came into existence, is another. Most statutes act on existing state of things Of course, a statute may expressly or by implication limit itself to events and conditions happening after the statute comes into force Section 8 of the General Clauses Act (Madras) referred to does not, in the least, help the appellant.

The intendment of the Act is clear Panchayat electorates are generally closed and compact bodies, and members of the Panchayat are expected to be in close contact with the electorate. They cannot live in anonimity For proper functioning of a Panchayat members have to command the confidence of the villagers and the Legislature might well have thought that in such circumstances, any imprisonment, whatever be its duration, provided it involves moral delinquency, debars a candidate from membership It will be anomalous, why inequitable, if a person who has undergone, say, four months imprisonment for an offence involving moral delinquency and comes out of jail just a day before coming into force of the new Act could stand for election, while another who has been a day after the new Act came into force sentenced to imprisonment for four days, for a similar offence, is disqualified for five years and could not contest the election But that will be the result of acceding to the argument for the appellant

Learned Counsel for the appellant referred to the decision in In re *School Board Election for Parish of Pulborough Bourke* v *Nutt*[1] In that case a person had become bankrupt prior to the English Bankruptcy Act of 1883 and had been elected a member of a School Board after passing of the Act Section 32 of the Bankruptcy Act, 1883 provided that 'where a debtor is adjudged bankrupt, he shall . . be disqualified or . being elected to the office of member of a school board' On the question whether the disqualification under the Bankruptcy Act applied to the person, the Court of Appeal by a majority held that the section had no retrospective operation, and therefore, the disqualifications created by it did not apply to a person, made a bankrupt before the passing of the Act The decision is clearly distinguishable and is based on an interpretation of the words is adjudged bankrupt. It was further pointed out that the Act was not a School Board Act, but a Bankruptcy Act, for the primary purpose of defining the liabilities and consequences of bankruptcy, and the new disability was imposed by the Bankruptcy Act on a bankrupt The well-known principle in the construction of statutes, that where words admit of two constructions they are not to be construed so as to produce a retrospective effect or impose disabilities on the passing of the Act, was applied

The decision directly in point is *Reg* v *Vine*[2] referred to and distinguished in the *School Board Case*[1] There section 14 of the Wine and Beer Amendment Act, 1870 provided that, 'every person convicted of felony shall for ever be disqualified from selling spirit by retail' It was held that the disqualification applied to a man who had been convicted before but had obtained a licence after the Act was passed Mellor, J said .

> " It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character "

The case proceeded on the principle, that if a statute creates disqualifications for the public good and not as a punishment to the person disqualified, it should not be treated as penal so as to exclude its being construed retrospectively The language employed in section 25 of Madras Act XXXV of 1958 "a person who has been sentenced" is descriptive of a candidate at the time of nomination. Grammatically considered, the words predicate certain quality of the subject which may just as well attach by a conviction before as after the new Act

There is no substance in the contention that the words "date of expiration thereof" should mean the date of conviction and sentence and the period of five years must be counted from the date on which the sentence was passed This is to ignore that the section provides for the passing of five years from "the date of expiration thereof" The effect of the reference back can only be, having regard to the previous words, that he shall be disqualified for election as a member while undergoing the sentence and for five years from the date on which, the sentence the person was undergoing

1. L.R (1894) 1 Q.B. 725 2 L R 1950 Q B Cases.

expired, that is, five years from the completion of the term of imprisonment. In the present case, the appellant came out of jail on 3rd October, 1960 and the disqualification subsisted for five years from that date The disqualification ended with 2nd October, 1965 It follows that the Election Tribunal correctly set aside the election of the appellant.

The appellant challenges the order of the Tribunal declaring, in the circumstances, the election petitioner, the defeated candidate, to be duly elected in the place of the appellant In our view, the challenge has to prevail The ward in question was a three members constituency and there were five nominations. Though the nomination of the appellant was challenged, the Presiding Officer overruled the objection, and, one of the candidates Ramiah, withdrew his candidacy within the prescribed time Among the contesting candidates, the appellant secured 308 votes and, of the other two who were elected, one got 323 votes and another, 316 votes The election petitioner who was defeated secured only 13 votes The Election Tribunal is conscious that it is not bound to declare the defeated candidate elected and may order re-election One cannot speculate that Ramiah would have withdrawn his candidacy even if the appellant's nomination had been rejected. In our view, it would be a mockery of democracy, if the defeated candidate who had secured only 13 votes while others inclusive of the appellant each secured over 300 votes, should be declared elected In the result, while holding that the election of the appellant has been properly set aside, we have to quash the order of the Election Tribunal declaring the election petitioner to be duly elected It follows that there is a vacancy and there will have to be fresh election Under rule 12 of the Rules for decision of election disputes relating to Panchayats, at the conclusion of the enquiry, if the Election Court declares the election of the returned candidates void, it shall further pass an order either (*a*) declaring that an yother party to the petition who has under the rules claimed the seat has been duly elected or (*b*) ordering a fresh election Therefore, proceeding under Article 227, we direct the Election Tribunal to pass appropriate orders in the circumstances.

The writ appeal succeeds to the extent indicated above. The parties will bear their respective costs.

V.S. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE T VENKATADRI

International Oil Co., by its Proprietor, Selvaraj, carrying on business at 119, Varada Muthiappan St, G T Madras *Appellant**

v.

Indian Oil Co., Ltd., now known as Indian Oil Corporation Ltd , by its Branch Manager, Marketting Division, Khivraj Mansion, Madras .. *Respondent.*

Contract of agency—Termination of—Absolute power of cancellation reserved in favour of one party—Validity—Agency if can be terminated without notice to other party.

In all indefinite mercantile or commercial contracts, the question whether the relationship of principal and agent can be terminated by a reasonable notice or only by mutual consent is one of construction subject to the rules of law There is no general rule of permanence An agency may be terminated in various ways If the termination of agency by the principal is inequitable or works an unjust hardship on the agent, the law requires a reasonable notice to be given An absolute power of cancellation of contract cannot be validly reserved in favour of one of the parties.

In the instant case the Indian Oil Corporation has reserved an absolute power of cancellation of the contract of agency and has actually cancelled the agency without assigning any valid reasons Such a clause in the contract is absolutely

*S.A No. 618 of 1967. 22nd November, 1968

illegal, irregular and void It is true the agent had knowledge of the existence in the agreement of the sword of Damooles' termination clause Even then it is unfair on the part of the Corporation to terminate the agency without due regard to the equities of an agent, without just provocation and without any notice.

Appeal against the decree of the City Civil Court, (Principal) Madras in A. S. No 109 of 1966 preferred against the decree of the City Civil Court, II Asst Judge, Madras in O S. No 3891 of 1964

P R. Gokulakrishnan, and *R G. Rajan*, for Appellant

C. Ramakrishnan and *T. Sathiadev*, for Respondent.

The Court delivered the following

JUDGMENT —This second appeal arises out of a suit instituted by the plaintiff, the proprietor of International Oil Co , against the Indian Oil Corporation, for an injunction restraining the defendant from withholding the supply of kerosene to the plaintiff The supply of kerosene was on the basis of a contract entered into between the parties on 6th February 1964 (Exhibit A-1) The defence to the suit is that since the plaintiff had not complied with the terms of the agreement embodied in Exhibit A-1, he is not entitled for any continuous supply of kerosene and in any event, the suit itself is not maintainable The plaintiff after some correspondence with the defendant had to file a suit for injunction restraining the defendant, Indian Oil Corporation, from continuing the breach of contract, namely, withholding supply of kerosene After the suit was filed, the Indian Oil Corporation by its letter dated 19th December, 1964, terminated the contract itself The questions that were considered by Courts below were whether the suit for injunction is maintainable, whether the defendant committed a breach of the contract and whether the plaintiff is entitled to damages The Courts below gave a concurrent finding that the plaintiff is not entitled to any injunction against the Indian Oil Corporation as there was a valid termination of the agency, that the Corporation did not commit any breach of contract when it did not supply any kerosene to the plaintiff and that the plaintiff is not entitled to claim any damages The suit was dismissed Now it is against the dismissal of the suit, the second appeal is preferred

The only question that arises for my consideration is whether the Indian Oil Corporation can terminate the agency with the plaintiff without any notice It is conceded by the learned Counsel for the Corporation that Exhibit A-1 was entered into between the parties on the basis of an agency agreement It will be convenient to extract the relevant portion of Exhibit A-1 as hereunder

"We have pleasure in appointing you as our dealer for the distribution of kerosene in Madras The appointment is made on the understanding that you will distribute at least 150 kilo litres per month to start with and increase your off-take in the subsequent months You are advised that this appointment does not preclude us from appointing more agents for the same area We also reserve the right to terminate your dealership without assigning reasons Your actual area of operation will be intimated to you by our sales officers"

It is on the basis of this agreement that this Court has to interpret whether the suit is maintainable for an injunction and whether the Corporation can terminate the agency without any notice. The learned Appellate Judge is of the opinion that the Corporation is not bound to supply kerosene to the appellant on the basis of the agreement I am unable to agree with the said observation made by the learned appellate Judge

It is necessary for me now to state the circumstances under which the agency agreement was terminated The parties entered into the agreement on 6th February, 1964 It states that the plaintiff must sell at least 150 kilo litres in April, 200 kilo litres in May, 160 kilo litres in June, 170 Kilo litres in July and 37 kilo litres by the end of August, 1964 On 24th August, 1964, the Indian Oil Corporation sent

a notice to the appellant stating that they were very much depressed to note that the off take during the month till date (24th Augsut,) 1964 was only 37 kile litres They further stated that since the plaintiff was having access at the same time to Western India Oil Distributing Co., as well as the Indian Oil Corporation, the sales were not pushed through as per the agency agreement The Corporation also advised the plaintiff " to make arrangements for complete switch over to us before the 19th September, 1964 " This letter of warning is given by the Corporation to the appellant in order to make him concentrate on the sales of kerosene belonging to the Indian Oil Corporation The appellant immediately replied to that letter stating that despite the comparatively higher prices of the Corporation's kerosene, the plaintiff had been faithfully pushing up the sale with all sincerity and that the charge that the sales were on the slide scale because the plaintiff had access to the Western Indian Oil Co , is unwarranted and unfoundable. In that letter, the plaintiff had also written that the Corporation has stopped supply of kerosene without any notice and without assigning any reasonable cause From the two letters I find that the Corporation supplied 37 kilo litres of kerosene to the plaintiff-appellant till the end of August, 1964.

But equally the learned Counsel for the Corporation represents to me that it is for the appellant to place an order for the required quantity of kerosene for the purpose of sales in his locality But whatever may be the quantity that was indented and sold by the appellant in the month of August, it is common case that in the month of September, 1964, supply of kerosene was stopped, and on 29th September, the appellant issued a notice calling upon the Corporation to resume the supply of kerosene, as otherwise, they would be forced to take legal remedies for the loss and damage the plaintiff had sustained by the Corporation's withholding the supply unilaterally.

It is common case that even at the time of appointing the appellant as the agent for the supply of kerosene of the Indian Oil Corporation, the Corporation was aware that the appellant's father was engaged in the distribution of kerosene belonging to the Western India Oil Distributing Co Therefore, the question that now arises for my consideration is whether the Corporation can terminate the agency without giving any notice That will depend upon the construction of a particular agreement, and upon its nature, and where it involves mutual trust and confidence and personal relationship between the parties, it is determinable unilaterally An agreement is no doubt a bare permission or licence It imposes no obligation on the Indian Oil Corporation to supply kerosene continuously But in the present case, it is not the case of the Corporation that it is on account of want of kerosene, that they have stopped supplying kerosene They allege that since the appellant was not diligent in effecting sales of kerosene in North Madras even to the minimum extent of 150 kilo litres and since his father was engaged in the distribution of kerosene of the Western India Oil Distribution Co his agency agreement was terminated Here again on a perusal of the records it is seen that the appellant had sold 120 kilo litres of kerosene in April, 200 kilo litres in May, and 160 kilo litres in June During the controversial period, the plaintiff alleges that the Corporation stopped supplying kerosene on account of bitterness that existed between the parties. In *Rhodes* v *Forwood*[1], a owner of a colliery employed an agent to sell coal for seven years or as long as the agent should continue to carry on business at the town. The agreement was made in consideration of the services and payment to be mutually rendered The agreement contained provision for putting an end to the agreement by notice if the owner of the colliery could not supply or if the agent could not sell a certain amount of coal per year At the end of four years, the owner sold the collery itself and in an action by the agent for damages for breach of the agreement the House of Lords held that the action was not maintainable, for the agreement did not bind the colliery owner to keep his colliery In *Turner* v. *Goldsmith*[2], a shirt manufacturer, engaged *A* as his agent to be paid by commission. The agency was to be determinable by either party at the end of five years by notice.

1. L R. (1876) 1 A C. 256 2 L.R.(1891) 1 Q B 544

A was to do his utmost to obtain orders for and sell such goods of *P* as should from time to time be forwarded or submitted by sample or pattern to *A* During the five years, *P*'s factory was burnt down, and *P* did not resume business It was held that *A* could recover damages because there was an express agreement to employ him for five years, and that agreement was not performed unless he was supplied with a reasonable amount of samples to enable him earn commission, and the fact that the factory was burnt down did not excuse *P* from liability From the above decisions, the conclusion is that as long as there is enough stock of kerosene, the defendant Corporation cannot withhold supply of kerosene to the appellant But it is urg d that withholding supply for the months of August and September does not arise because, there is material before the Corporation to show that the appellant himself did not place an order with the Corporation for the supply of kerosene It is on account of the fact that the offtake for the month of August was only 37 kilo litres and since the Corporation felt that the appellant was having access to the Western India Oil Distributing Co, the Corporation was dissatisfied and stopped supply of kerosene to the appellant without due notice and without assigning any reasonable cause The agency itself was actually terminated in December, that is after the institution of the suit Once again I am saying that it is, not a case where on account of non-availability of kerosene that the Corporation withheld supply of kerosene to the appellant during the month of September, 1964 In *Llanelly Railway and Dock Co* v *London and North Western Railway Co*[1]. James L J has observed thus.

"I start with the proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, which it is reasonable to be implied that it was not intended to be permanent and perpatual, but was to be in some way or other subject to determination"

In all indefinte mercantile or commercial contracts, the question whether the relationship of principal and agent can be terminated by a reasonable notice or only by mutual consent is one of construction, subject to the rules of law There is no general rule of permanence An agency may be terminated in various ways. If the termination of the agency by the principal is inequitable or works an unjust hardship on the agent, the law requires a reasonable notice to be taken The Indian Oil Corporation cannot arbitrarily terminate the contract of employment nor they can break the contract prematurely or without the specific notice It is a case of wrongful dismissal and the plaintiff can sue for damages It is a case of an exchange of mutual promises and the effect of it is of contractual nexus exhibited between the parties where the agent has promised to devote time and energy on behalf of the principal in return for reward. Their relationship bears a close analogy to that between employer and employee The agent has agreed to serve the principal The principal has agreed to accept and to pay for that service It is clear therefore that any unilateral termination of the relationship by either party will be wrongful unless it is in accordance with the contract. Having regard to its nature, terms and the surrounding circumstances, it must be decided that it is not reasonable that revocation should be available to one party alone.

Learned Counsel for the appellant brought to my notice the case in *Martin-Baker Aircraft Co, Ltd* v *Canadian Flight Equipment Ltd. and Martin Baker Aircraft Co.* v. *Munson*[2], where the plaintiffs appointed *M*, as their sole selling agent for all their products on the North American continent and *M* agreed to use his best endeavours to promote and extend the sale of the products on the maximum possible scale throughout the territory, and *inter alia*, not to sell or be interested in any way in the territory in products which might be competitive with the plaintiff's and to act as general consultant to the plaintiff's concerning the marketing of the products in the territory, while the plaintiff's agreed not to appoint any other person as their agents or distributors in the territory. The agent's remuneration was to be a

1. L R VIII Ch App. Cases 942, 949 2 (1955) 2 All E.R 722 (1955) 2 Q B 556

commission at the rate of 17½ per cent on orders obtained by him. The plaintiffs desired to determine the relationship, but the agent contended that it was terminable only by mutual consent It is in that connection, that McNair, J., observed at page 582 :

> " If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be terminable summarily at any moment. But if an agreement of this nature has to be looked at as a whole, and the whole of its contents considered, and if one finds (as one finds here) that the person who is described as sole selling agent has to expend a great deal of time and money and is subject to restriction so as to the sale of other persons' products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where admittedly the agreement is terminable not summarily—except in the event of misconduct —but by reasonable notice "

Following the above observation, I am of the view that this is a case where the appellant can validly contend before this Court that the agency cannot be terminated without any notice. In *Thathiah* v. *M. and S M Railway*[1], a Bench of this Court has observed that an absolute power of cancellation of contract cannot be validly reserved in favour of one of the parties In the instant case, the Indian Oil Corporation has reserved an absolute power of cancellation of the contract and has actually cancelled the agency without assigning any valid reasons. I am of the view that such a clause in the contract is absolutely illegal, irregular and void. It is true that the plaintiff-appellant has knowledge of the existence in the agreement of the sort of 'Sword of Damocles' termination clause Even then, it is unfair on the part of the Corporation to terminate the agency without due regard to the equities of an agent and without just provocation to cancel. Therefore, I am not able to agree with the findings of the Court below that the suit is not maintainable and that the Corporation is not bound to supply kerosene to the appellant. On the other hand, it is a clear case of breach of contract and also termination of the agency without assigning any cause to such termination.

The Indian Oil Corporation belongs to the Public Sector The Corporation is enlarging the economic potentialities of our nation in exploiting the oil resources from our fields The success of this public enterprise would entirely depend upon the efficient distribution of oil through proper agents to the public. Either in selecting the agents or in cancelling their agency, extraneous consideration should not prevail. There should not be an element of uncertainty in entering intoan agreement with the commission agents

In the instant case, the plaintiff was appointed in the month of February, 1964 and while he was attempting to push the sales in his area, even in the month of August, the Corporation disheartened him. In the month of September, the Corporation stopped the supply. In the month of October, the plaintiff rushed to the Court with a prayer to direct the Corporation not to withhold the supply and also obtained an injunction restraining the Oil Corporation from appointing any other agent in that area In the month of December, the Corporation terminated the agency On a review of the events that took place rapidly between the parties there appears to be something wrong which I am not able to understand All that I can say is that the agency cannot be terminated without proper notice, and it is quite contrary to the principles established by law The second appeal is allowed with costs, and the plaintiff's claim will stand decreed as prayed for. Leave granted.

V.K. *Appeal allowed.*

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1 I.L.R. (1957) Mad. 315 : (1956) 2 M.L.J. 584

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMI REDDY.

K. Shanmugasundara Nadar .. *Appellant**

v.

V. Sadasivam . *Respondent.*

Criminal Trial—Conviction on a particular charge by trial Court—Alteration of conviction to another by appellate Court—Permissibility.

Penal Code (*XLV of* 1860), *section* 420—*Offence of cheating—Essentials.*

It is true that if a person is convicted of a particular charge, on appeal such conviction can be altered to another if facts warrant. But this can be done only if material prejudice is not caused to the accused.

The gravamen of the charge under section 420, Penal Code, is the delivery of property in consequence of the inducement made by false representation, by the party who obtained the property.

A representation need not always be by oral statement ; it can be inferred from the conduct of the parties. But, when the man to whom the representation was said to have been made was examined, there is no question of inferring a representation from the conduct of the party.

It is the duty of the prosecution to prove that at the time when the representation was made, it was not only false but that the person who made such false representation knew that it was false and with that knowledge, he made such representation making the other party believe such representation and thereby induced the party deceived to deliver a property. Of course, it is true that what happened subsequently should be taken into consideraton for the purpose of finding out as to what should have been the intention of the person at the time when he made the representation. It will depend upon the facts of each case. Even if the subsequent conduct of a person creates suspicion, it would not be enough. It is possible that when a man makes a promise by making representation, he would have expected that he could fulfil the promise ; but the subsequent circum stances and events that might happen may justify his inability to fulfil the promise. In these circumstances, it cannot be said that the person who made the promise made it falsely.

Appeal against the judgment of the Fourth Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras, in C. C. No. 4690 of the Calendar for 1966 dated 22nd November, 1967

V. Rajagopalachari and *S. Natesan,* for *K. Gopalachari* and *G. Krishnan,* for Appellant.

S. Govindaswaminathan and *I. Subramaniam,* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, Shanmugasundara Nadar was convicted under section 420, Indian Penal Code, and sentenced to undergo R.I. for six months and to pay a fine of Rs. 500, by the Fourth Presidency Magistrate, Madras, in C.C. No. 4690 of 1966.

The facts of the prosecution case are these : The appellant is an industralist. He has been doing business in collaboration with Czeckoslovakian people. He had accounts in various banks like, National & Grindlays Bank Ltd., Madras, Canara Bank, Indian Overseas Bank etc It appears that he was also having certain business connections in foreign countries, and exporting handlooms and getting import incentive licences. In November, 1965, he was expecting National Defence Remittance Certificates and wanted one Sathar who was doing import business in the name

* Crl. A. No. 829 of 1967. 26th November, 1968.

of Commercial Syndicate, examined as D W 1 in this case, to find out whether he could sell those certificates on forward sale basis. Sathar contacted one Swami of Swami & Co., who were importers. A fortnight later, Swami brought P.W. 1 Sadasivam of Bangalore as a prospective buyer. Swami and D.W 1 Sathat negotiated the deal on behalf of the appellant and both Sadasivam (P.W. 1) and the appellant entered into an agreement (Exhibit P-1) on 25th November, 1965. By virtue of the agreement, it was agreed that the appellant should secure an import entitlement certificate for an amount not less than Rs. 4,00,000 of Indian Currency, that P.W. 1 should purchase the said certificate at the rate of 175 per cent on Rs 4,00,000 and that such certificate should be handed over to P.W. 1 on or before 15th January, 1966, time being the essence of the contract and P.W. 1 should pay an earnest money of Rs. 1,25,000. If there was a breach of the agreement, P.W. 1 shall be entitled to the refund from the appellant the earnest money of Rs. 1,25,000 and a further payment of Rs. 50,000 as and by way of damages. If P.W. 1 failed to pay the balance amount of consideration, the appellant shall be entitled to cancel the transaction and refund the earnest money of Rs. 1,25,000 after retaining Rs. 50,000 as damages. According to the agreement, P.W 1 has paid Rs 1,25,000 to the appellant as earnest money. This is not disputed.

The appellant failed to comply with the terms of the agreement and did not deliver the certificates on or before 15th January, 1966, and thereby committed breach of the agreement On 22nd January, 1966, the appellant wrote a letter to P.W. 1 stating that due to certain circumstances beyond his control, there was bound to be some delay in getting the certificates as agreed and, therefore, he requested P.W 1 to give him extension of time upto 28th February, 1966. On 25th January, 1966, P.W. 1 sent a telegram to the appellant informing him about the breach of the agreement and asking him to remit forthwith Rs. 1,25,000, and also a sum of Rs. 50,000 stipulated as damages. On 27th January, 1966, P.W. 1 again wrote a letter to the appellant regretting his inability to extend time. On 11th December, 1966, in supersession of the agreement dated 25th November, 1965, P.W. 1 and the appellant entered into a fresh agreement Exhibit P-8 wherein it is stated that as the appellant could not fulfil his commitments in time due to reasons beyond his control and as P.W. 1 refused to grant extension of time, the appellant agreed to refund the amount received by him as advance and also a sum of Rs. 15,000 by way of damages. The agreement further states that the parties have agreed to cancel the previous agreement dated 25th November, 1965. In pursuance of this agreement on 11th February, 1966, the appellant gave three post-dated cheques to be drawn on the Canara Banking Corporation, namely (1) for Rs. 50,000 to be cashed on 26th February, 1966 ; (2) for Rs. 40,000 to be cashed on 28th February, 1966 , and (3) for Rs 35,000 to be cashed on 4th March, 1966. Another cheque for Rs. 15,000 as compensation was also given to P.W. 1 by the appellant, to be cashed on 10th March, 1966.

It appears that the appellant stopped payment on the post-dated cheques issued by him and, therefore, the cheques could not be cashed. Thereafter, P.W. 1 sent a lawyer's notice on 8th March, 1966 stating that he believed his words when he handed over the post-dated cheques that the cheques could be cashed, that, therefore he agreed to cancel the previous agreement and that the act of the appellant would amount to cheating. In that notice, the appellant was asked to pay the amount due to him within three days, as otherwise, he would be forced to resort to criminal and civil proceedings. The appellant promptly replied to the lawyer's notice on 11th March, 1966 stating that though the post-dated cheques were given to P.W. 1, the understanding was that P W 1 should present the cheques with the consent of the appellant. He also explained in the reply notice that the Government of India extended the scheme of obtaining National Defence Certificates as a concession shown for persons obtaining foreign exchange from foreign countries upto 31st May, 1966 and that the inward remittances which he had arranged with the foreign countries earlier were delayed, the delay being entirely beyond his control. He further stated that on 24th February, 1966, he sent a letter to P.W. 1 by registered

post explaining the difficulties and his letter was unfortunately returned to him on 8th March, 1966 as "addressee was on tour and date of return not known" He also stated that under the direction of P W 1, he handed over five Bank Certificates signed by him leaving the authorization column blank, to the representatives of P.W. 1, Mr. Swami and Sathar (D.W 1) with the understanding and instructions to dispose the certificates on a minimum premium of 180 per cent and on receipt of the sale proceeds of the Bank certificates, he would agree to pay Rs. 50,000 only in March and the balance later. He added that he wrote a letter on 5th March, 1966 under certificate of posting to P.W 1. In this letter, the appellant asked P.W. 1 to accept Rs. 50,000 on receipt of the sale proceeds of the Bank Certificates and to wait to receive the balance of Rs 90,000 on or before 31st May, 1966 which was the date extended for National Defence Remittance Scheme. The complaint was filed by P.W. 1 before the Presidency Magistrate on 18th March, 1966.

After examining four witnesses including P.W. 1 the complainant and after questioning the appellant, the learned Fourth Presidency Magistrate framed the following charge :

> "That you, on or about the 11th day of February, 1966 at Madras, cheated one Sadasivam by dishonestly inducing him to deliver a sum of Rs 1,40,000 to you and which was the property of the said Sadasivam and thereby committed an offence punishable under section 420 of the Indian Penal Code . . . . . ."

The learned Counsel for the appellant contended that the charge as framed by the Magistrate is unsustainable on the facts of this case and there is absolutely no evidence to indicate that the appellant had made any false representation to P W. 1 and P.W. 1 was induced by such false representation to deliver any property. There appears to be force in both the contentions of the learned Counsel It is clear from the facts that on 11th February, 1966 when a fresh agreement was entered into by both P.W 1 and the appellant, the prior agreement dated 25th November, 1965 was specifically cancelled According to the prosecution, the cheating was in respect of the handing over to P.W 1 of the post-dated cheques, thereby making P.W. 1 believe that these cheques could be cashed on the dates mentioned in the cheques and that on that account, he had foregone a substantial portion of the compensation stipulated in the prior agreement, namely, a sum of Rs 35,000. It is not the case of the prosecution that on the date when Exhibit P-8 was entered into and when the post-dated cheques were handed over that P W. 1 parted with a sum of Rs. 1,40,000 as mentioned in the charge extracted above. The gravamen of the charge under section 420, Indian Penal Code, is the delivery of property in consequence of the inducement made by false representation, by the party who obtained the property. On 11th February, 1966, admittedly P.W. 1 did not deliver a sum of Rs 1,40,000 It appears that at the time of arguments in this case, the Magistrate felt a difficulty that this charge has been wrongly framed and attempted to amend the charge, but as it was objected to by the appellant that it would cause a great prejudice to him, to amend the charge at that stage, the learned Magistrate gave it up and, however, convicted him under the same erroneous charge under section 420, Indian Penal Code The learned counsel for the respondent would submit that even now the conviction can be altered to one under section 417, Indian Penal Code, and that, therefore, if the facts warrant for some alteration, there cannot be a bar for convicting the appellant under section 417, Indian Penal Code, though the charge under this section is not specifically framed. It is true that if a person is convicted of a particular charge, on appeal, such conviction can be altered to another if facts warrant, but this can be done only if material prejudice is not caused to the appellant. In this case, it is clearly seen that the appellant took a specific objection for altering the charge in the trial Court itself stating that it would cause material prejudice to him and that it should not be done The Magistrate could have over-ruled the objection of the appellant and amended the charge and could have given opportunity to the appellant to meet the amended charge by recalling the witnesses

examined already and to examine his own witnesses This was not done by the Magistrate ; but curiously, as already pointed out, he convicted him on the erroneous charge In these circumstances, I do not think, it would be fair and just to alter the conviction, even if the facts justify.

Even on the facts of the case, I do not think any offence is made out The entire correspondence, as narrated *supra* between the parties, would indicate that there were certainly *bona fides* in respect of the stand taken by the appellant. It is true that the appellant gave post-dated cheques. It is also true, as seen from the evidence of P W. 2, that the appellant stopped payment of cheques before they could be encashed. But what happened is this A fresh agreement was entered into on 11th February, 1966 as the appellant could not fulfil the terms of the earlier contract. He gave post-dated cheques on the date of the fresh agreement He must have expected that he would get moneys by that time It cannot, therefore, be said that at the time when he handed over the post-dated cheques, he made a false representation, which induced P.W 1 to give up his claim for damages for Rs. 35,000 as stipulated in the earlier agreement. He has not stated in his evidence as to what was the representation made by the appellant, what made him believe his representation and what he did in consequence of such representation A representation need not be always by oral statement, but it can be inferred from the conduct of parties But, when the man to whom the representation was said to have been made was examined, there is no question of inferring a representation from the conduct of the party. P W 1 must have positively stated as to what was the representation the appellant made. He has failed to do so. This is undoubtedly a fatal lacuna. It is argued by the learned Counsel for the respondent that there is an indication in the agreement Exhibit P-8 as to what the representation must have been I do not see any indication there It is only an agreement between two parties. It is possible that the appellant made representation that he would give post-dated cheques and that P W. 1 might agree to reduce the amount of compensation and it is equally possible that P W 1 himself might have told the appellant to give post-dated cheques to him and that in consideration of his receiving the cheques immediately he would forego a portion of the compensation stipulated in the earlier agreement, as he might have been sure that at least he would get the cash within the time specified in the post-dated cheques. Therefore, it cannot be said that from the terms of the agreement, it can be inferred that the appellant necessarily made a representation stating that he would give post-dated cheques and requesting the respondent to forego a substantial portion of the compensation It is the duty of the prosecution to prove that at the time when the representation was made, it was not only false but that the person who made such false representation knew that it was false and with that knowledge, he made such representation making the other party believe such representation and thereby induced the party deceived to deliver a property Of course, it is true that what happened subsequently should be taken into consideration for the purpose of finding out as to what should have been the intention of the person at the time when he made the representation It will depend upon the facts of each case. Even if the subsequent conduct of a person creates suspicion, it would not be enough It is possible that when a man makes a promise by making representation, he would have expected that he could fulfil the promise ; but the subsequent circumstances and events that might happen may justify his inability to fulfil the promise. In these circumstances, it cannot be said that the person who made the promise made it falsely.

There are circumstances in this case which would indicate that the appellant was actuated by *bona fides* in his transaction. After he entered into the first agreement (Exhibit P-1) that he would deliver the certificates on or before 15th January, 1966, he could not comply, as the Government of India extended the scheme, by which a person could get foreign exchange freely with a concession, to get certificates of the value of 60 per cent of the foreign exchange obtained by him This caused a delay in getting the foreign exchange, as there was speculation in the market and, as seen from the evidence, the price of the certificate has been going down This

was the reason that the respondent refusd to extend time for the appellant fulfilling his part of the promise as he would stand to lose in consequence of the price of certificates going down Therefore, both the parties entered into a freh agreement, Exhibit P-8, by which the respondent agreed to receive the money paid by him with a compensation of Rs 15,000 probably persuaded by the fact that the appellant gave post-dated cheques for the purpose of encashment of the money due by him under the agreement It appears from the records that before the cheques could be put in the banks, the appellant sent a letter to P W 1 by registered post on 24th February, 1966 explaining the difficulties in putting sufficient funds in the bank. But of course, this letter was returned on 8th March, 1966 as it could not be served as the respondent was on tour This would indicate that even before the cheque could be presented, the appellant had attempted to inform P.W 1 about his difficulties and not to present the cheques. In the meanwhile, we see not only from the statement of the appellant but also from the evidence of D W 1 that the appellant handed over five bank certificates signed by him to D W. 1 with instructions to dispose of the certificates on a minimum premium of 180 per cent. agreeing to pay a sum of Rs 50,000 to the respondent from the sale proceeds. The appellant would say that he wrote a letter on 5th March, 1966 under certificate of posting to P W. 1 asking him to accept a sum of Rs 50,000 on receipt of the sale proceeds of the bank certificates and to receive the balance on or before 31st May, 1966. But the complaint was filed on 18th March, 1966 As a matter of fact, it is stated that the respondent received a sum of Rs. 50,000 from the appellant in the course of the trial of this case. Thus, we see that the appellant was taking all necessary steps that he could take in informing the respondent then and there about his difficulties and ultimately paying a sum of Rs 50,000 available to him It also appears that the respondent had filed a suit for recovery of the amount due from the appellant and he had attached the properties of the appellant which is said to be worth about a few lakhs.

It is strenuously argued by the learned Counsel for the respondent that the conduct of the appellant in having stopped the payment before the cheques could be presented, gives a sure indication that he had no mind to pay the amount due to the respondent and that he should have made a false representation even at the time when post-dated cheques were handed over to the respondent He also pointed out that admittedly a sum of Rs 77,000 was credited in the National and Grindlays Bank to the account of the appellant Unfortunately, in this case, the pass books of the appellant, either of the Canara Bank or the National and Grdindlays Bank were not summoned to be produced We do not know whether in the Canara Bank, the appellant had sufficient money He might have stopped the payment even before the cheques were presented if he had no sufficient money, so that the cheques might not be dishonoured for want of funds It may be that the appellant might have considered that if the cheques were dishonoured, it might affect his reputation as a businessman. Though *prima facie*, this circumstance may appear to be a suspicious one, yet, the possibility of the appellant having stopped payment due to insufficient funds in the Bank cannot be ruled out Further we do not know what other pressing commitments the appellant had besides the commitments made by him to the respondent. It may also be possible that there might have been other pressing demands and that he wanted to fulfil those demands Of course all these things are in the realm of speculation However, in the absence of positive proof from the prosecution that the representation made by the appellant was false and that the respondent believed it to be true and that he was induced to forego a substantial portion of the compensation, on such representation, the conviction cannot be sustained.

In the result, the appellant is acquitted and his bail bond is cancelled The fine amount, if paid, will be refunded to him. The appeal is allowed.

V.K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN

Murugappa Kadanthiar .. *Petitioner**

v.

The Inspector of Panchayats-*cum*-Collector of South Arcot, Cuddalore and another *Respondents.*

Madras Panchayats Act (XXXV of 1958), *sections* 26 (*j*). 27 (2), 28, 56 *and* 152—*No-confidence motion against president—Out of nine members of panchayat six members disqualified for not attending* 3 *consecutive meetings under section* 26 (*j*)—*No step by them either for restoration or for decision by prescribed judicial authority—Rights of such members in the interregnum—Participation in meeting held under section* 152—*Resolution— Validity of*

Absence of a member at three consecutive meetings as provided in sction 26 (*j*) of the Act will make him incur the disqualification on *prima facie* grounds. On the incurring of the disqualification, he will also *ipso facto* cease to be a member; and he loses his membership automatically It is for him thereafter to apply for restoration to the panchayat, on or before the date of its next meeting He is given a further right of getting the matter decided, if he still disputes the fact of the disqualification or if the panchayat itself has not given him relief or restored him to the office, by the prescribed authority, namely, the District Munsif under section 28 of the Act It is not necessary for a person to await the decision of the panchayat on his application under section 27 (2) He could apply to the prescribed judicial authority under section 28 (1) straightaway and get a decision. If he resorts to this course, he has got the further privilege of relying upon section 28 (2) that pending decision of the prescribed judicial authority, he is entitled to act as if he is qualified or were not disqualified. In other words, if in the interregnum he had attended meetings and taken part in the passing of the resolutions, they would be valid, even if the ultimate decision was that he was disqualified But if he does not make the application to the prescribed judicial authority under section 28 (2), he cannot rely upon the provisions of section 28 (2) for claiming validity for the decision in which he has taken part.

(1) When the executive authority intimated the six members concerned in this case, that by their absence at three consecutive meetings they had ceased to hold office, he was exercising a statutory power conferred on him under section 27 (2) of the Act (2) The members, thus appraised of their disqualification, cannot continue to be members and take part in the meetings of the panchayat without applying for restoration under section 27 (2) of the Act or resorting to the alternative remedy; they have to move the prescribed authority under section 28 and get a decision in their favour and be restored to office. (3) After they have filed the application under section 28 (1) and during the pendency of the application before the prescribed authority, by relying on section 28 (2), they may be entitled to act as if they were not disqualified but this is intended for validating the proceedings in which they have been taking part in the interregnum But they cannot claim such a privilege without first applying for relief to the prescribed authority under section 28 (1) of the Act.

On facts held, the resolution of no-confidence must be treated to be invalid because it had the support of six members who were not entitled to vote, and therefore it lacked the support of two-thirds of the membership of the panchayat

Section 56 will validate a resolution of a panchayat only if the *sole reason* alleged for the invalidity of the resolution of the panchayat is that a member (members) who supported the resolution was not qualified to vote. But here, the invalidity

*W P. No 1246 of 1966. · 31st December, 1968.

of the resolution is based really on the fact that it did not get the support of 2/3rd of the membership of the panchayat, which is necessary under the statute for a valid passing of the no-confidence resolution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the passing of the no-confidence motion against the petitioner herein on 29th January, 1966 and quash the order passed by the Inspector of Panchayats, Cuddalore-1, in S. No. 3 13 8040/66, dated 6th April, 1966

R. Balasubramanyam, for Petitioner.

T. Kanakaraj for the Government Pleader, for Respondents.

The Court made the following

ORDER —The petitioner, Murugappa Kadanthiar, is aggrieved against an order dated 6th April, 1966 passed by the first respondent, the Inspector of Panchayats-*cum*-Collector of South Arcot, Cuddalore, declaring, on the strength of a no-confidence resolution passed by the Melur Panchayat, Vridhachalam Taluk, on 29th January, 1966, that the petitioner had ceased to be President of the Panchayat. This order was passed by the first respondent under section 152 (13) of the Madras Panchayats Act, 1958 (Act XXXV of 1958) (hereinafter called the Act). The petitioner's prayer is to quash the above order by a writ of *certiorari* under Article 226 of the Constitution in the following circumstances.

The panchayat has got nine members. Six of them, whose names are mentioned in paragraph 2 of the affidavit of the petitioner, had absented themselves for three consecutive panchayat meetings between 1st September, 1965 and 20th December, 1965 Thereby they became subject to the disqualification in section 26 (*j*) of the Act. The petitioner as president and executive authority of the panchayat, acting under the provisions contained in section 27 (2) of the Act, intimated the members that they had lost their membership At a meeting which the panchayat held 15 days subsequent to the issue of the notices to them, the panchayat also passed a resolution for the removal of the above members The fact was also communicated by the petitioner to the Revenue Divisional Officer, Vridhachalam, and the Commissioner, Panchayat Union, Nallur In pursuance of the communication, the Commissioner, Panchayat Union, Nallur, issued notices to the six members stating that they had been removed from membership of the panchayat with effect from 21st December, 1965 One other member of the panchayat, a woman member, who had been co-opted had also resigned her membership on 27th January, 1966. While matters stood thus, a special meeting was held by the second respondent, the Tahsildar, Vridhachalam, on 29th January, 1966 for the purpose of considering a no-confidence motion brought against the petitioner Notwithstanding the fact that the six members mentioned above had lost their membership on 21st December, 1965 and notwithstanding the fact that the co-opted woman member had resigned on 27th January, 1966 the Tahsildar, the second respondent, allowed them to participate in the meeting on 29th January, 1966 and thereafter passed a resolution of no-confidence in the petitioner by a more than two-thirds majority. The petitioner wanted to attend the meeting and bring to the notice of the Tahsildar the fact of disqualification of the above members The meeting was scheduled to be held at 4 p. m. But when the petitioner went to the place of the meeting at 3-45 p m he was told that the meeting was already over and that a resolution of no-confidence had been passed. The petitioner's contention is that the six members, who had partaken in the no-confidence resolution against him, had ceased to be members from 21st December, 1965 and consequently the resolution itself was illegal and should be quashed. No point was raised at the hearing of the writ petition about the disqualification of the lady member.

As against this, in the counter affidavit filed on behalf of the respondents by the Collector of South Arcot the following allegations are made regarding the facts

of the case. At the instance of some members of the Panchayat, the second respondent issued a notice on 20th December, 1965 to the petitioner along with a copy of the no-confidence motion, which was proposed to be passed against him. Shortly afterwards, the petitioner sent a petition on 8th January, 1966 to the second respondent stating that six of the members had ceased to be members under section 26 (*j*) of the Act. He enclosed to the communication a copy of the resolution of the panchayat on 6th January, 1966 about the six members losing their membership. The Commissioner of the Panchayat Union Council also intimated the second respondent on 27th January, 1966 of the resolution of the Panchayat. But the no-confidence motion was scheduled to be considered on 29th January, 1966 The counter-affidavit of the respondents then goes on to discuss the merits of the alleged disqualification of the six members on the ground that they did not attend three consecutive meetings of the Panchayat It was stressed in the counter-affidavit that due notices had not been given to them as required under the rules. In the above circumstances, it is alleged in the counter-affidavit, that it must be held that the six members were not disqualified under section 26 (*j*) ,and the resolution of the Panchayat that they were so disqualified must be viewed as illegal. It is also alleged in the counter-affidavit that the notice of disqualification to the six members was issued by the petitioner only on 21st December, 1965, that is, after the six members had applied to the Tahsildar expressing want of confidence in the petitioner. The counter-affidavit says that the Panchayat Union Commissioner, Nallur, had no authority to perform any function under sections 26 to 28 of the Act and pass orders about the disqualification of members. That power is vested, when there is a dispute, in the civil Court, under section 28 (1) of the Act. In regard to the resignation of the woman co-opted member, the counter-affidavit goes on to say that the respondents deny the allegation that she has resigned. The counter-affidavit states that the questions whether the six members did actually became disqualified under section 26 (*j*) of the Act and whether the co-opted woman member had actually resigned are not matters which could be gone into by this Court' in writ proceedings. They should be left for decision to the civil Court under section 28 (1) of the Act.

The stand taken by the respondents in this case in their counter-affidavit is that as the notices for the meetings to the six members were not issued in the proper form, they did not incur the disqualification under section 26 (*j*), and that the view, that they were so disqualified, held by the President, the petitioner, and subsequently affirmed by the Panchayat at the resolution on 9th January, 1966 is not correct. The counter-affidavit also states that since there is a dispute regarding the six members incurring disqualification, it should be adjudicated by the civil Court (the prescribed judicial authority) under section 28 (1) of the Act, and not by any other authority including the Commissioner of the Panchayat Union and this Court itself in writ proceedings, for the reason that the question will require consideration of facts besides law. One obvious answer to this argument is that while the matter is still not decided by the appropriate judicial authority, it is equally outside the province of the respondents to go into the question of disqualification and give an opinion, as they have done in the counter-affidavit, that as the six members had not incurred the disqualification, they were entitled to participate in the no-confidence resolution.

The questions therefore which arise are the following :—When a member of a Panchayat fails to attend three consecutive meetings and *prima facie* incurs the disqualification in section 26 (*j*) of the Act and the view is taken that he has become so disqualified, by the President as well as by the Panchayat and he is also intimated that fact which is the authority that has to decide the dispute about the disqualification, what are the rights of the member in the interregnum before the dispute is decided, and to what extent is any resolution passed by the Panchayat to which he has subscribed in the interregnum valid?

The provisions of the Panchayats Act in section 26, and in particular section 26 (*j*) ,section 27 and section 28 are *in pari materia* with the corresponding provisions

in the District Municipalities Act (Act V of 1920) as well as the Madras Local Boards Act (Act XIV of 1920). There are prior decisions under these Acts which throw light on the above questions The gist of these decisions appears to be that absenee of a member at three consecutive meetings as provided in section 26 (j) of the Act will make him incur the disqualification on *prima facie* grounds. On the incurring of the disqualification, he will also *ipso facto* cease to be a member. Section 27 (2) of the Act reads thus :

> " 27 (2) Where a person ceases to be a member under clause (j) of section 26, the Executive Authority or the Commissioner shall at once intimate the fact in writing to such person and report the same to the Panchayat or the Panchayat Union Council as the case may be as its next meeting If such person applies for restoration *suo motu* to the Panchayat or the Panchayat Union Council, as the case may be, on or before the date of its next meeting or within fifteen days of the receipt by him of such intimation, the Panchayat or the Panchayat Union Council, as the case may be, may at the meeting next after the receipt of such application restore him to his office of member
>
> Provided that a member shall not be so restored more than twice during his term of office "

This section, therefore, makes it clear that on the incurring of the disqualification in section 26 (j), the member loses his membership automatically It is for him thereafter to apply for restoration to the Panchayat, on or before the date of its next meeting The Panchayat is given the power, at the meeting held next after the receipt of the application, to restore him to his office if they consider it proper to do so In the proviso to section 26 (j) of the Act it is stated that no meeting from which a member absented himself shall be counted against him if due notice was not given to him or if the meeting was held after giving shorter notice than that prescribed for an ordinary meeting or if the meeting was held on a requisition of members It will be for the member aggrieved by the intimation made to him of his disqualification by the Executive Authority or the Commissioner (the President of the Panchayat in this case) under section 27 (2) of the Act, to approach the panchayat and seek restoration, and put forward these circumstances as grounds on which he relies for justifying his absence. He is given a further right of getting the matter decided, if he still disputes the fact of the disqualification or if the Panchayat itself has not given him relief or restored him to the office, by the prescribed authority, namely, the District Munsif under section 28 of the Act. Section 28 is in the following terms :—

> " 28 *Authority to Decide Questions of Disqualification of members* —(1) Whenever it is alleged that any person who has been elected as a member of the Panchayat or who becomes a member of a Panchayat Union Council is not qualified or has become disqualified under sections 22, 24, 25, 26 or 27-A and such person does not admit the allegation, or whenever any member is himself in doubt whether or not he is not qualified or has become disqualified under sections 24, 25, 26 or 27-A such member or any other member may, and the Executive Authority or the Commissioner as the case may be shall, on the direction of the Panchayat or Panchayat Union Council or of the Inspector, apply to the prescribed judicial authority whose decision shall be final.
>
> (2) Pending such decision, the member shall be entitled to act as if he is qualified or were not disqualified "

It is not necessary for a person to await the decision of the Panchayat on his application under section 27 (2) He could apply to the prescribed judicial authority under section 28 (1) straightway and get a decision If he resorts to this course, he has got the further privilege of relying upon section 28 (2) that pending decision of the prescribed judicial uthority, he is entitled to act as if he is qualified or were not disqualified. In other words, if in the interegnum he had attended meetings

and taken part in the passing of the resolutions, they would be valid, even if the ultimate decision was that he was disqualified. But if he does not make the application to the prescribed judicial authority under section 28, he cannot rely upon the provisions of section 28 (2) for claiming validity for the decisions in which he has taken part.

Obviously, in the present case, the six members, who were intimated about their disqualification by the President in section 26 (j) of the Act, did not resort to either of the two courses above for getting rid of the disqualification alleged against them. On their own initiative they ignored the allegation of disqualification and acted as if they were qualified, and took part in the no-confidence resolution There is no warranty in the Act for them to ignore the statutory intimation of their *prima facie* disqualification by the President under section 27 (2) of the Act, and to proceed to vote for the no-confidence resolution as if the disqualification did not exist, and as if they had the authority of a judicial decision of the prescribed authority removing their *prima facie* disqualification. Nor can they claim the benefit of section 28 (2) as they had not applied to the prescribed authority under section 28 (1).

Prior earlier decisions of this Court no doubt under the parallel enactments mentioned above, in my opinion, clearly support this view. In *Subbaroya Goundan* v. *Muthukumaraswami Goundan*[1], the petitioner who was the President of the Taluk Board of Palladam, failed to attend the meetings of the Taluk Board for three consecutive months and thereby incurred the disqualification under section 56 of the Madras Local Boards Act (Act XIV of 1920), which contains the provisions *in pari materia* with section 26 (j) of the Act Section 56 (4) of the Local Boards Act, corresponds to section 27 (2) of the Act. Section 57 of the Local Boards Act gives the aggrieved person the right to move the District Judge for a decision about his disqualification and is similar to section 28 (1) Section 57 (3) is analogous to the provisions in section 2 (8) of the Act and says that pending decision of the District Judge, the member shall be deemed to be qualified In that case, the petitioner did not apply to the Local Board for restoration He applied to the District Judge who found that he was disqualified But in the meantime the petitioner got himself again elected as President by the Taluk Board This fact was relied upon by the petitioner for holding that he continued to be a member as well as President. That claim was negatived by Wallace, J , in the revision petition, and the District Judge's decision was upheld about the member ceasing to hold the office In the course of the decision, the learned Judge observed

> "*Prima facie* . . the petitioner ceased under section 56 to be a member. If no application had been put in under section 57 and he is not restored under section 56 (4), then his cessation continues. If an application was put in under section 57 and the District Judge decided that he did cease to be a member, then he did cease to be a member from the date fixed in section 56, but for the purpose of saving the validity of proceedings in which he may have taken part after he had ceased to be a member, he is deemed to be qualified during that period "

Wallace, J , also observed :

> " Section 57 (3) does not say that he remains a member. It says that he shall be ' deemed to be qualified' That was intended, I have no doubt, to prevent the proceedings of meetings in which a member who on an enquiry under section 57 has been declared to have ceased to be a member had continued to attend and take part being invalidated by his having taken part, and is similar in intention to section 35 There is no justification in the language of section 57 for holding that the mere presentation of an application under section 57 has the effect of restoring *pro tem* to office one who had ceased to hold office "

In *Thiruppuliswamy* v *Manickam*[2], P V Rajamanner, C J , has followed the decision of Wallace, J , mentioned above. That was a case which arose under the

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1. (1926) 51 M.L.J. 265.   2. (1954) 2 M L J. 680.

District Municipalities Act of 1920 Section 51 of the District Municipalities Act is analogous to section 28, and clause (3) of section 51 is analogous to clause (2) of section 28 of the Panchayats Act The learned Judge observed ·

> " That section (section 50 (1) (*b*) of the District Municipalities Act, 1920) enacts that if a Councillor becomes subject to one or other of the disqualifications enumerated therein, *he shall cease to hold his office*. No doubt, in case of dispute, section 51 provides for recourse to the District Judge But it is not as a result of the order of the District Judge that a Councillor ceases to hold his office The Councillor ceases to hold office because of the supervening disqualification. It may be that no application has been filed under section 51. It may be that an application is filed late "

In *Kuppuswami* v. *Corporation of Madras*[1], the question arose under the Madras City Municipal Act and came before a Bench of Ramachandra Ayyar, C J and Venkataraman, J This decision is authority for the proposition that even if the Executive Authority does not report about a member ceasing to be a member under section 27 (2) to the Panchayat, the disqualification continues and on the member's application for restoration, the Panchayat has jurisdiction to consider and grant it only at its next meeting and not at any subsequent meetings Particularly, this decision lays down the *raison d'etre* for laying down such a disqualification which automatically accrues to a member when he absents himself from three consecutive meetings. At page 386 of the report, the Bench said

> " It is the essence of proper civic administration that the elected councillors who represent the various divisions in the city should attend the meetings of the council and protect the interest of those whom they represent Failure to attend meetings would affect the rate-payers who are representd by the concerned councillor. Section 53 (corresponding to section 26 (*j*) of the Panchayats Act), therefore, provides a sanction against the default by forfeiture of office for continuous absence. It also makes a provision for a fresh representation by election by the division whose representatives thus fail to attend At the same time, an exception is provided by sub-section (4) by vesting discretionary power in the council to restore the member Such power, if exercised will have the effect of preventing a fresh election "

In *Chinnathambi* v *Executive Officer*[2], Veeraswami, J , held that the disqualification under section 26 (*j*) of the Act is sustained automatically, and unless the member concerned is restored, he ceases to be a member The learned Judge followed the Bench decision in *Kuppuswami* v. *Corporation of Madras*[1] There is one more Bench decision in *Kumaraswami* v *Joint Collector*[3], which lays down that where an Act itself provides a statutory mode of determining a controversy of facts (whether a member is disqualified or not) it would be wholly out of place for a party claiming to be aggrieved, to seek relief at the hands of the High Court under Article 226 of the Constitution In that case, the writ petitioner was aggrieved against a no-confidence resolution passed against him by the Panchayat He alleged that the resolution was not valid because four of the participating members had become disqualified by reason of non-attendance at three consecutive meetings of the Panchayat Srinivasan, J , who dealt with the writ petition found that the version of the President (petitioner before him) that a meeting took place could not be accepted for the reasons stressed by the learned Judge. It led to the consequence that the ground of disqualification failed to be established The Tahsildar, who presided at the meeting at which the no-confidence resolution was passed, also considered the question of alleged disqualification and decided that the objection was not sutainable and that the vote of no-confidence was validly passed Before the Bench in writ appeal, it appears that the question whether the petitioner had incurred the

1. I L.R (1964) 1 Mad. 14 · (1964) 2 M L J 380.
2 (1965) 1 M L J 397
3 (1965) 2 M L J 375 A I R. 1965 Mad. 431.

disqualification validly or not, was raised. But the learned Judges stated that in view of the specific provision in the act of adjudicating such a dispute in section 28 (1) of the Act, writ jurisdiction cannot be invoked for a decision on the question, which was a question of fact But it has to be remembered that in the above Bench decision no ground was taken as to whether the communication to the members by the Executive Officer under section 27 (2) of their having incurred disqualification will *prima facie* make them cease to be members, until they are able to get themselves restored to their membership on application to, the Panchayat or by moving the prescribed authority ; nor has the question as to the scope of section 28 (2) been considered in the Bench decision But these are points which are clearly considered in the three decisions cited above—(*Subbaroya Goundan* v *Muthukumaraswami Goundan*[1], *Thiruppuliswamy* v *Manickam*[2] and *Chinnathambi* v. *Executive Officer*[3]).

As against this, learned Counsel for the respondents has referred to three unreported decisions of Kailasam, J., in. Writ Petitions Nos. 390 of 1966, 512 of 1966, and 1772 of 1966. Relying upon the decision in *Kumaraswami* v. *Joint Colleector*[4], the learned Judge seems to have dismissed the writ petitions in W. P No. 390 of 1966 and W. P. No. 512 of 1966 *in limine* holding that when a machinery is provided under the Act for deciding question of disability under the Act, it will be wholly out of place for the party to have the question decided in writ proceedings. In Writ Petition No. 1772 of 1966 while, dismissing it *in limine* the learned Judge observed .—

> " The disqualification of a member under section 26 can, therefore, take effect only after a decision is rendered as contemplated in section 28 If it is found by the judicial authority that the person came by the disqualification on a particular day, he might have ceased to be a member from that date But till such a decision is rendered, he continues to be a member and under section 28 (2), the member is entitled to act as if he is qualified."

But the trend of the earlier decisions cited above shows on the other hand that following the absence of a member at three consecutive meetings, when the Executive Officer intimates the member that he has ceased to be a member under section 26 (*j*) it operates as a *prima facie* disqualification, leading to the loss of his membership until he is restored to office by the Panchayat or a decision in his favour is given by the prescribed authority on application made to that authority under section 28. Kailasam, J in Writ Petition No 1772 of 1966 has referred to want of authority fot the proposition that the moment it is alleged, but not admitted, that a member is disqualified, he becomes disqualified from that date, even though the dispute is not referred to the judicial authority for decision under section 28. But this point appears to be covered by the decision in *Thiruppuliswamy* v. *Manickam*[2], where, following the decision in *Subbaroya Goundan* v. *Muthukumaraswami Goundan*[1], the following observation is made :

> " It does not mean, however, that merely because an application has not been filed or had not been filed within certain time that the councillor, though disqualified under any one of the provisions (*a*) to (*i*), nevertheless does not cease to hold his office till determination by the District Judge This point is, I think covered by the observations of Wallace, J., in *Subbaroya Goundan* v. *Muthukumaraswami Goundan*[1] "

There is, therefore, no room at all for entertaining any doubt on the point in the light of the several earlier decisions of this Court, as to the scope of the several provisions now under consideration They lead to the following conclusions : (1) When the Executive Authority intimated the six members concerned in thie case, that by their absence at three consecutive meetings they had ceased to hold office, he was exercising a statutory power conferred on him under section 27 (2) of the Act. (2) The

1 (1926) 51 M L J 265
2, (1954) 2 M L J 680
3. (1965) 1 M.L.J. 397.
4, (1965) 2 M L J 375 A I.R 1965 Mad. 431.

members, thus appraised of their disqualification, cannot continue to be members and take part in the meetings of the Panchayat without applying for restoration under section 27 (2) of the Act, or resorting to the alternative remedy which they have to move the prescribed authority under section 28 and get a decision in their favour and be restored to office. (3) After they have filed the application under section 28 (1) and during the pendency of the application before the prescribed authority, by relying on section 28 (2), they may be entitled to act as if they were not disqualified but this is intended for validating the proceedings in which they have taken part in the interregnum. But they cannot claim such a privilege without first applying for relief to the prescribed authority under section 28 (1) of the Act. It is admitted that in this case, the six members have not resorted to any of the abovementioned courses, and consequently, the resolution of no-confidence must be treated to be one as not valid because it had the support of six members who were not entitled to vote, and therefore it lacked the support of 2/3 of the membership of the Panchayat.

In the counter-affidavit reference is made to section 56 of the Act as a provision which will in any event validate the no-confidence resolution. That section reads thus :

> " 56 *Acts of Panchayats, Panchayat Union Councils, etc not to be invalidated by informality, vacancy, etc* —No act of a Panchayat or of a Panchayat Union Council or of a committee thereof or of any person acting as President, Vice-President, Chairman, Vice-Chairman or member of such Panchayat or Panchayat Union Council or of a chairman or member of a committee shall be deemed to be invalid by reason only of a defect in the establishment of such Panchayat or Panchayat Union Council or Committee, or on the ground that the President, Vice President, Chair-Chairman, Vice-Chairman or member of such panchayat or Panchayat Union Council or chairman or member of a committee was not entitled to hold or continue in such office by reason of any disqualification or by reason of any irregularity or illegality in his election, or by reason of such act having been done during the period of any vacancy in the office of President, Vice-President, Chairman, Vice-Chairman or member of such Panchayat, Panchayat Union Council or Committee."

This section will validate a resolution of a Panchayat only if the *sole reason* alleged for the invalidity of the resolution of the Panchayat is that a member (or members) who supported the resolution was not qualified to vote. But here, the invalidity of the resolution is based really on the fact that it did not get the support of 2/3rds of the membership of the Panchayat, which is necessary under the statute for a valid passing of the no-confidence resolution On the other hand, by way of example in a Panchayat, with nine members, if seven members had voted for the no-confidence resolution and it is found that one of them is disqualified to vote, that circumstance alone will not invalidate the resolution the reason being that there were, still six members of the Panchayat who validly supported the resolution Section 56 covers such a case.But in the above example if the supporting valid votes fall below the required 2/3rds of the membership, the resolution is invalid, not solely because some invalid voteswere cast in its support but because it did not have the required minimum support of 2/3rds of the membership of the Panchayat, qualified to vote. This objection ofthe respondents also is without substance.

The writ petition is, therefore, allowed. No order as to costs.

S.V.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE T RAMAPRASADA RAO

V. David Raja .. *Petitioner**

v.

J P. Devaraj and others . *Respondents.*

Partition suit—Plaintiff suing for partition by metes and bounds and separate possession of his share—Defendants, co-sharers, also claiming partition and separate possession of their respective shares—Nature and scope of such suit—Preliminary decree, granting relief to plaintiff alone—Relief to defendants—Grant of subsequently

Civil Procedure Code (V of 1908), *Order* 14, *rule*1*—Failure to frame issue—Partition suit—Practice—Grant of relief to parties—Duty of Court.*

Ex vi terminis all joint properties are liable to be partitioned in an action for partition, whomsoever may be in possession of the same, unless they are alienees, who purchased the same or in possession of the same as *bona fide* alienees without notice of the character of the property Vignaneswara defines the word 'Vibhaga' the English equivalent of partition, as " the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate." This principle is applicable even in a suit for partition among non-Hindus, provided they are co-owners Right to obtain partition is an invariable appendage to the incidence of ownership of property and in a partition suit, once the right of the co-sharers is upheld as co-owners thereto, their right to partition cannot be opposed.

(*On facts, held*) in the instant case all the parties were before Court and indeed they were seeking their right for separate possession of their respective shares. The mere fact that all the defendants or the contesting defendants failed to oblige themselves at that time to pay the Court-fee, is not the *sine qua non* for negativing their right to secure a partition of their share in the totality of the estate, the moment the plaintiffs right to claim partition has been upheld. The other sharers having been arrayed as such defendants does not matter, so long as they desired a partition as well Once the necessary parties are found to be sharers, their right to partition flows from such ownership and it would be so, even if one sharer comes to Court and asks for a partition and separate possession of his share. For a greater reason the suit ought to be construed as a suit for a comprehensive partition because the defendants also join in the securing of the relief and are entitled to a defined and definite share in the estate.

It is now well established that the Court has the power to pass more than one preliminary decree in a partition suit if the circumstances of the case need it. There is no interdict for this course in the Code of Civil Procedure. One or more of such a preliminary decree or every direction given by Court after the passing of a preliminary decree would be in the nature of a further step towards the passing of the final decree and in any case the effect of such preliminary decrees if there be more than one, and directions given in the interim ought to be reflected in the final decree. Such being the correct position, Courts are not injuncted from granting the normal and usual reliefs in a partition action, even at any earlier point of time, it has missed to do so Exercise of such jurisdiction is not taken away by the passing of a preliminary decree, as the suit is still deemed to be pending notwithstanding such an embryo decree. If therefore by oversight, mistake or inadvertence the relief to which the defendants were entitled, was not granted and a preliminary decree for a comprehensive partition was not made, though it was obligatory, the mistake can be corrected and on enquiry the necessary relief may be granted to the defendant who comes forward with the request for division and allotment of his share, subject to adjustment of equities.

* C.R.P. No. 1226 of 1966. 17th January, 1969.

If the trial Court has failed to frame an issue on such pleadings and the appellate Court ignored the purport of the same, it is but fair and just to hold that the parties ought to be given their legitimate reliefs. An act of Court ought not to prejudice a litigant. The by-passing of the essential aspects of pleading, when ordinarily it is the duty of Courts to frame issues, without focussing its attention to the points to be determined in the action, ought not to be the basis for negativing the normal reliefs to which the parties to a suit are entitled to By granting such a relief, the Court would have acted justly equitably, conscientiously and obviate the necessity of an unnecessary suit, with all its attendant risks.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Madurai Taluk at Madurai, dated 3rd May, 1966 and made in I A No 1261 of 1964 in I.A No. 108 of 1962 in O S. No. 118 of 1955.

S. Kothandarama Nayanar, for Petitioner.

S G Ramachandra Iyer for *T R Ramachandran*, for 20th Respondent.

The Court made the following

ORDER —The 37th defendant in O S No 118 of 1965 on the file of the Court of the District Munsif, Madurai Taluk, is the petitioner in this Civil Revision Petition He filed an application, I A. No 1261 of 1964, under Order 26, rule 14 (3) read with section 151 of the Code of Civil Procedure, for certain directions to supercede the report of the commissioner appointed in I A No 108 of 1962 at the instance of the plaintiffs in the suit, and for appointing a fresh commissioner to divide the suit properties by metes and bounds into 8 shares and for allotment of such each share to the sharers entitled thereto Being unsuccessful before the lower Court, he has come up to this Court in revision

Relevant facts have to be noticed before the contentions of Counsel can be dealt with and appreciated The properties belonged originally to one Joseph He died leaving behind his sons and daughters, who were admittedly entitled to a *one eighth* share in the properties, which were situate at Pasumalai The plaintiffs' father was one such sharer and the 37th defendant-petitioner is also a sharer as an heir of the 6th defendant Many defendants died during the pendency of the proceedings before the lower Courts and it is not necessary to set out their kinship and their entitlement as sharers in the estate of Joseph, as they have been fully set out by the trial Judge as well as the appellate Court Most of the sharers were living outside Pasumalai and the properties were therefore managed and dealt with by defendants 2, 6 and 7. The plaintiffs alleged that such possession and management of the suit properties by defendants 2, 6 and 7 ought to be deemed to be joint possession of all the co-sharers and the management was in a representative capacity The plaintiffs questioned the alienations made prior to the suit filed on 28th June, 1954, by some of the defendants and made the fallowing specific allegations in the plant

5. " From and after the dealth of the late Mr. P. Joseph his heirs namely plaintiffs and defendants 1 to 15 and the deceased sons and daughter of the late Mr P Joseph had all been in joint possession and enjoyment of the property left by the late Mr P Joseph and described in Schedule A hereunder. There has been no division of the said property among the heirs so far and the plaintiffs and defendants 1 to 15 are entitled to an 1/8th share, defendants 1 and 2 to another 1/8th share, defendants 3 to 5 to another 1/8th share, defendants 6, 7, 14 and 15 each to 1/8th share and defendants 8 to 13 to the remaining 1/8th share in the undermentioned property described in Schedule A "

6.. .. .The possession of defendants 2, 6 and 7 was only in their capacity as co-sharers or co-owners along with the other heirs of the late Mr P Joseph and their possession was not only for themselves but also on behalf of the heirs of late Mr Joseph ....The plaintiffs and defendants 1 to 15 had been and are thus in joint possession and enjoyment of the property described in Schedule A hereunder.

7 .... Any alienation by the 7th defendant without the consent of the other co-sharers is not binding on the latter...........On account of the

conduct of the 7th defendant, it became no longer possible to continue jointly and it had become necessary to have the share of the plaintiff separated.

10 The plaintiffs do not admit the truth, validity and binding nature of the abovesaid alienations made by the defendants 2 and 7 and the said alienations are void and not binding on the plaintiff and defendants 1 to 15. Even if the said alienations are true and valid, the same can bind only the shares of the alienors and not the other sharers............

13. The plaintiffs have therefore filed this suit for partition by metes and bounds and separate possession of their 1/8th share in the undermentioned property, taking into consideration the buildings, well and garden and vacant site in the suit property, for future mesne profits at the rate of Rs. 20 a month and for other reliefs."

It is not disputed that in the written statement filed by the other co-sharers, they have claimed partition and separate possession of their respective shares. It is unfortunate however that neither the trial Court has framed an issue on this nor has the appellate Court while reversing the decision of the trial Court, adverted to this important aspect in the pleadings. The trial Court dismissed the suit and on appeal, the learned Subordinate Judge held that at no time there was exclusion of possession of the properties to the detriment of the sharers as contended by the alienees and that the shares to which the defendants and plaintiff were respectively entitled were not in dispute. The lower appellate Court found that on the death of Joseph his sons and daughters were entitled to the properties as co-heirs and also accepted in principle the proposition that the possession of one or more heirs of joint properties on the death of the common ancestor must be deemed as possession of all the sharers. He ultimately held :

" 18. *Point* 4.—The question of the monies spent by the 16th defendant for repairs to the houses need not be considered just now The equities to which the parties are entitled also can be considered later on a full review of the circumstances existing at the time of the division of the property . . .... The plaintiffs will be entitled to a preliminary decree for partition of their 1/8th share The appeal is allowed with costs."

On the strength of the above decree, which is admitted by the parties to have become final, the plaintiffs filed I. A. No. 108 of 1962 for appointment of a Commissioner and for passing a final decree by dividing the properties and by allotting their shares. On the Commissioner reporting, the petitioner filed I. A. No. 1261 of 1964 to supersede the report and for a proper implementation of the preliminary decree passed by the appellate Court. His prayer is that under the said decree, the properties have to be divided into eight equal shares, and each sharer allotted one thereto and the alienees' equities be adjusted equitably. The 16th defendant, an alienee, opposed the application as not maintainable. The learned District Munsif was of the view that the only relief claimed by the plaintiffs in the suit was for possession of their separate share and that being the main relief, the prayer for partition in the plaint is only ancillary. On that ground, he dismissed the application.

Learned Counsel for the petitioner took me through the pleadings and argued that the nature of the relief asked for by the plaintiffs has to be understood in the light of what was stated in the written statement of the defendants and that the suit is effectively one for a comprehensive partition and is not in the nature of a suit in ejectment against any alienee. Learned Counsel for the respondent relied on *Adhikari Vishnumurthiayya* v. *Authaiya*[1], and *Veerabhadrayya* v. *Seethamma*[2], and urged that the impugned order has been correctly made.

Ex vi termini all joint properties are liable to be partitioned in an action for partition, whomsoever may be in possession of the same, unless they are alienees, who

1. (1918) 35 M.L.J. 153. 2. A.I.R. 1940 Mad. 236.

purchased the same or in possession of the same as *bona fide* alienees without notice of the character of the property. Vignaneswara defines the word 'Vibhaga' the English equivalent of partition, as "the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate" This principle is applicable even in a suit for partition among non-Hindus, provided they are co-owners. Right to obtain partition is an invariable appendage to the incidence of ownership of property and in a partition suit, once the right of the co-sharers is upheld as co-owners thereto, their right to partition cannot be opposed. see *Chhote Khan* v *Mal Khan*[1] In that case the parties were Muslims. In *M D Kasim Ali Khan* v *M D Sadiq Ali Khan*[2], the Judicial Committee was again concerned with the estate of a Muslim. There the question arose as to what was the nature of a suit against the estate of a deceased person, for a share to which he was entitled to.

Their Lordships were of the view that

> "in the case of a Muslim who had left property the right of an heir as a beneficiary would be to have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies and thereafter he should be given possession of his share therein
>
> Their Lordships further observed that such a suit might be denominated an administration suit or a suit for partition but the basis of his claim would be the same, *viz*, the right to have due administration of the deceased's estate."

Relying on the above ratio, a Full Bench of the Andhra Pradesh High Court held in *Mobiuddin* v *Sayeedunnissa*[3]

> "These observations of the Privy Council would make it clear abundantly that a suit for a share in a deceased person's assets is in the nature of a suit for a share in partition or an administration suit and if that is the suit, the provisions of Order 20, rule 13, Civil Procedure Code or Order 20, rule 18 would apply and if these rules apply then there has necessarily to be a preliminary decree wherein the shares of the various heirs are determined and later on a final decree."

In *Periaswami* v. *Dhanalakshmi*[4], a suit was filed by one of the sharers for partition and mesne profits The Subordinate Judge decreed the suit for the plaintiff's share alone and gave certain other ancillary reliefs, in the presence of almost all the other sharers Disagreeing with this view, the Division Bench of our Court held :

> "It is found that the learned Subordinate Judge in this partition suit has given a decree only for the plaintiff But as a matter of fact, he should have considered the shares of all the heirs on whom the properties devolved on the death of Chinnammal and given a preliminary decree to that effect. In a suit for partition it is not the array of parties that is relevant but the fact that all the members entitled to shares are on record and found entitled to reliefs . . . . . This will obviate their being driven to a futile fresh suit."

In the instant case all the parties were before Court and indeed they were seeking their right for separate possession of their respective shares. This important pleading was ignored and the scope of the suit was apparently misconstrued at the time of passing the so called preliminary decree for partition by the appellate Court. The mere fact that all the defendants or the contesting defendants failed to oblige themselves at that time to pay the Court-fee, is not the *sine qua non* for negativing their right to secure a partition of their share in the totality of the estate, the moment the plaintiffs' right to claim partition has been upheld; see *Mahbul Ahmed* v. *Afzalunniza*[5] The other sharers having been arrayed as such defendants does not matter, so long as they desired a partition as well

1. (1954) S C J 577 : (1955) 1 S C R 60 : A.I R 1954 S C 575.
2. (1938) 2 M L J. 210 : L R 65 I.A. 219 : A I R. 1938 P C 169.
3. (1961) 1 An W R 241 A I.R 1961 A.P. 335, 337 (F B)
4. A I R 1960 Mad 391.
5. 160 I.C. 206.

If in the light of the ratio of the above decisions the facts of the case are analysed it is clear that the primary intention of the plaintiffs and the defendants was to obtain a general partition of the estate and for the possession of their respective determinable shares. The mere superficial reference to the language of the plaint in certain paragraphs thereto, would be to ignore the primary content and substance of it as set out and found in the entire plaint. The plaintiffs alleged that they and defendants 1 to 15 (as originally the parties were) had all been in joint possession and enjoyment of the properties The shares of each group has been reckoned and set out. It was also stated that *inter alia* the 7th defendant was in possession and management of the property in a representative capacity The plaintiffs allege that they demanded a partition from defendants 1 to 18, thus to came up with the suit for partition In the conspectus of such a narration of events, it would be too technical to characterise the relief asked as one in ejectment or one to obtain possession of the plaintiffs' share alone The allegations in the plaint do not justify the opinion that the relief for partition is ancillary In fact, the defendants asked for a partition and separate possession of their shares as well Such a co-ordinated request for a general relief for partition appears to be the essence of the pleadings in this suit In such a case the duty of Courts may be indicated thus If the trial Court has failed to frame an issue on such pleadings and the appellate Court ignored the purport of the same, it is but fair and just to hold that the parties ought to be given their legitimate reliefs An act of Court ought not to prejudice a litigant. The bye-passing of the essential aspects of a pleading, when ordinarily it is the duty of Courts to frame issues, without focussing its attention to the points to be determined in the action, ought not to be the basis for negativing the norml reliefs to which the parties to a suit was entitled to By granting such a relief, the Court would have acted justly, equitably, conscientiously and obviate the necessity of an unnecessary suit, with all its attendant risks

In the original suit the appellate Court found that no question of ouster arose as it should be deemed that the possession of the alienors-sharers should be attri buted to an understanding or arrangement between all the sharers. Once the necessary parties are found to be sharers, their right to partition flows from such ownership and it would be so, even if one sharer comes to Court and asks for a partition and separate possession of his share For a greater reason the suit ought to be construed as a suit for a comprehensive partition because the defendants also join in the securing of the relief and are entitled to a defined and definite share in the estate of late Joseph.

In this Court also learned Counsel for the Contesting respondent relies upon *Adhikari Vishnumurthiayya* v *Authaiya*[1], and *Veerabhadrayya* v. *Seethamma*[2]. The first case related to two reversioners of a Hindu widow one of whom, as plaintiff, was challenging an alienation made by the widow in favour of the 1st defendant and the other figured as the 2nd defendant The Court was of the view that the scope of the suit was different from that of a suit for partition They considered a reversioner as a tenant-in-common and the plaintiff in that suit as one who sued for his share alone and not as representing co-owners and therefore, nothing regarding the others can legitimately be decided I am of the view that in the instant case, a comprehensive partition was envisaged by all the concerned parties and in which the plaintiffs desired to obtain a relief by which all interested in the property can benefit. Even so in *Veerabhadrayya* v. *Seethamma*[2], Venkataramana Rao, J., held that that was a case where a tenant-in-common sued only to recover possession of his share and partition was only an ancillary relief. I have held that it is not the case here.

Further, it is now well established that the Court has the power to pass more than one preliminary decree in a partition suit if the circumstances of the case need it There is no interdict for this course in the Code of Civil Procedure Code; see *Kasi* v *Ramanathan Chettiar.*[3] One or more of such preliminary decree or every

1. (1918) 35 M.L.J 153
2 A.I.R. 1940 Mad. 236
3 (1947) 2 M.L.J 523.

direction given by Court after the passing of a preliminary decree would be in the nature of a further step towards the passing of the final decree and in any case the effect of such preliminary decree if there are more than one, and directions given in the interim ought to be reflected in the final decree. Such being the correct position, Courts are not injuncted from granting the normal and usual reliefs in a partition action even if at any earlier point of time, it had missed to do so Exercise of such jurisdiction is not taken away by the passing of a preliminary decree, as the suit is still deemed to be pending notwithstanding such an embryo decree If therefore by oversight, mistake or inadvertence the relief to which the defendants were entitled to, was not granted and a preliminary decree for a comprehensive partition was not made, though it was obligatory, the mistake can be corrected and on enquiry the necessary relief may be granted to the defendant who comes forward with the request for division and allotment of his share, subject to adjustment of equities. This is what the 37th defendant (the petitioner in this C R. P.) wanted. This was refused on the ground that the preliminary decree did not authorise the Court to do so. As pointed out by a Division Bench of this Court in A S. No. 322 of 1919 :

> " In all adjudications which are not intended to be final but only to be the determination of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation"

In *Basavayya* v. *Guravayya*[1], the question arose whether in a partition action, if the preliminary decree is silent on a provision for mesne profit it could be provided later. The learned Judges of the Full Bench after an elaborate discussion of law made the following observations, the usefulness of which can only be appreciated if reproduced:

> " We may now summarise our conclusions. A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree ; *Jadunath* v *Parameswar*[2] In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties a out of their relation to the common property the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected Among them are the realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the alien or and other similar matters Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters *suo motu* or on the application of the parties. Order 20, rule 18, Civil Procedure Code does not prohibit the Court from issuing such directions after the stage of a preliminary decree It is open to the Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, and in either case the result of the enquiry has to be incorporated in the final decree."

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1. I L R (1952) Mad. 173 : (1951) 2 M L J. 176 : A.I R. 1951 Mad 938 (F.B.).
2. I L.R (1940) 1 Cal 255.

The Full Bench was of the view that even after the passing of the preliminary decree, the Court has power to give appropria e directions regarding all or any of the matters arising in a partition action either *suo motu* or on the application of a party. Here the 37 h defendant applied for such directions The lower Court had the jurisdiction to grant the relief. Such direction would ultimately be another step towards the passing of the final decree The lower Court refused to do so on a misconstruction of the facts and law Thus it erred to exercise its jurisdiction The order is therefore erroneous and has to be set aside. Accordingly it is set aside, and this Civil Revision Petition is allowed. I. A No. 1261 of 1964 will be restored to file and dealt with in accordance with the observations in this judgment and in accordance with law. There will be no order as to costs

S.V.J ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE T. RAMAPRASADA RAO.

R. M. Solai Nadar .. *Petitioner**

v.

M/s. A T A.V. Guruswami Nadar & Co. represented by A.V. Guruswami Nadar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25 *and Civil Procedure Code, section* 115—*Revision—Scope of.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*a*) (iii) —*Ingredients—Non-residential building—Eviction petition—Occupation for owner or his son—When can be ordered*

Words and Phrases—'Requirement' and 'carrying on business.'

The scope of the proceedings under section 25 of Act XVIII of 1960 has been repeatedly held to be wider than that available to this Court in revision under section 115, Civil Procedure Code. Whereas under section 115, Civil Procedure Code interference is possible only on matters of exercise of jurisdiction, under section 25 of Act XVIII of 1960 (The Madras Buildings (Lease and Rent Control) Act, 1960, the legality, regularity and propriety of the order impugned can be canvassed in the High Court If therefore the High Court can probe and find whether an order of the lower Court is regular or proper, then it follows that the High Court can, in suitable cases, interfere with findings of fact as well, if they are *prima facie* unsustainable, irregular and improper, and disgorge such factual findings apparent on the face of the order.

The word 'requirement' is not equatable to a mere wish, convenience or whim of the landlord An element of "must have" is inhered in it A mere unbridled or arbitrary liking on the part of the landlord is not sufficient The landlord is the sole arbitor of his requirements Ultimately the opinion of a well-instructed Judge on the subject has to rest on the sincerity of the desire, the genuineness of the wish and the reality of the situation as established in evidence. Closely allied with the element of "genuine requirement" is proof of *bona fides* on the part of the landlord *Bona fides* of an individual is reflected in his conduct and his request and invariably if the requirement is found to be genuine, honest and not tainted with an oblique purpose, then *bonafides* normally spring from it.

There is no measure to reckon the activities covered by the expression "carrying on business." The very term comprehends an act or mercantile pursuit. The Legislature having not indicated the range of such pursuit or the nature of such acts, it is for the Courts to judge from the facts of each case, (*a*) whether they could be fairly and normally characterised as a present intendment on the part of the landlord to carry on a trading pursuit after having made *bona fide* preparations for the same, though it is not necessary to establish that he has enough capital to enter into the business, (*b*) that he has started in right earnest a trade, and (*c*)

* C.R.P No. 2000 of 1967. 24th January, 1969.

that his intentions are not obscure and motivated If the landlord or his son is already carrying on a business, then the problem becomes easier, for in such a case, the question is whether the need is genuine.

The general principle noticeable in the majority of cases appears to be that *bona fide* preparation to do business at the place where the tenant is trading coupled with an honest and genuine need for the same would entitle a landlord for an order under the section

Applying the tests laid down in *Nataraja Achari* v *Balasubramaniam*, (1957) 2 M L J 492, *Azimugdeen Sahib* v *Rangaswami Pillai*, (1958) 2 M L.J. 389 and *Rangaswami Pillai* v *Karmega Thevar* (1964) 2 M L J 89 I L R. (1964) 1 Mad 712 it was held that the desire of the landlord was not a mere wish but was reflection of genuine desire to occupy, for his business, Even considering the business carried on by the sons at Dindigul, it can reasonably be concluded that for that business at least the premises was required *Bona fides* is alien for consideration unless it is proved that there is a device in the proceeding other than honest.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Madurai, dated 14th February, 1967 and made in C. R P No 7 of 1963 (C M A No. 26 of 1961 on the file of the Court of the Subordinate Judge, Madurai R C O. P. No 511/60 on the file of the Rent Controller, Madurai Town)

K. V. Sankaran, for Petitioner.

A Shammugavel and *Miss Jayalakshmi Shanmugavel*, for Respondents.

The Court delivered the following

JUDGMENT —The petitioner-landlord is for a second time in this Court in the same proceedings wherein he sought the eviction of the respondent-tenant, under old section 7 (3) (*a*) (iii) as amended by Madras Act VIII of 1951 and new section 10 (3) (*a*) (iii) of Act XVIII of 1960, from a non-residential building of his in the town of Madurai Though the proceedings was initiated under the earlier Act as amended by Act VIII of 1951, yet it is not disputed that it is governed by the provisions of Act XVIII of 1960 The petitioner was unsuccessful throughout and when he came to this Court in C. R P. No 2154 of 1963, Alagiriswami, J. set aside the order of the District Judge on the ground that he did not apply his mind to the crucial question involved in the petition, whether the requirement of the non-residential premises by the petitioner was *bona fide* or not The matter was remanded to his file and once again the learned District Judge has disposed of the matter laconically and without adverting to the law applicable to the casse and without appreciating the correct facts It has therefore become necessary for me to peruse the records from the beginning and hear arguments of Counsel in full.

The relevant facts are as follows The petitioner who is a scrap-iron dealer for the past several years, is licensed to do the same business at Tirumangalam, not within the precincts of Madurai Town where the suit premises is situate. The petitioner has 8 sons of whom 3 are in business dealings in trunk boxes at Dindigul near Madurai. This is obviously allied to iron trade The petitioner in the witness box, though not in the pleadings, stated that the premises is required for the business of his sons also. It may be noted that the petition was filed under the Act of 1949 as amended by Act VIII of 1951, which provided for an application, in case it is a non-residential building, if the landlord is not occupying for purposes of a business which he is carrying on, a non-residential building in the City etc There was no provision then for a similar application for possession in case the premises was needed by his son The petition was filed in June 1960 Act XVIII of 1960 came into force from September, 1960 and under section 10 (3) (*a*) (iii), a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of the building, in case it is a non-residential building, if the landlord or his son is not

occupying for purposes of a business which he or his son is carrying on, a non-residential building in the City which is his own Section 35 of Act XVIII of 1960 enabled the petitioner to take advantage of the changed law and apparently he gave evidence before the Controller that the premises was required by his sons also The Rent Controller noticed this fact He categrically found that the documents filed as well as the petition indicated that the petitioner was doing business in scrap iron and that he required the building in the occupation of the respondent for the same He did not fully advert to the requirement of the premises by the sons of the petitioner, though it was specifically referred to in the evidence. He however held that the petitioner did not obtain any quota for such scrap iron for doing business in Madurai and surmised that the trade of the petitioner was random, precarious and not appreciable. He entertained a doubt whether the petitioner had any capital to expand or start a business at Madurai Hence he was of the view that it was doubtful if the petitioner *bona fide* thought of starting a business at Madurai and he dismissed the application

The appellate authority found that there cannot be much of doubt about the petitioner's business at Tirumangalam. Having found this, he dismissed the appeal on the ground that no application has been made to secure the quota of iron for Madurai. He also hesitantly found that the requirement pleaded for the sons' business is an after-thought, since it was not not pleaded The learned District Judge in the first instance laconically held that the requirement, even if true, was not *bona fide*. He however held that there was considerable force in the argument of the Counsel for the landlord that it was not possible for the landlord to apply for the quota of iron at Madurai, as by then there was no business place available to the petitioner, at Madurai. This Court in revision in C. R P. No 2154 of 1963 set aside the order of the learned District Judge as it appeared *ex facie* that he did not apply his mind and come to a conclusion that the requirement was not *bona fide* On remit, the learned District Judge for a second time purported to consider the merits and came to a conclusion that the documents do not positively establish that the petitioner wanted to expand the business because the petitioner did not obtain the quota for iron for Madurai. According to him, there was no evidence of any arrangement having been made at Madurai by the petitioner to start the business and he abruptly came to the conclusion that the petitioner has not proved his version that he required the premises for his own use. He again dismissed the petition. Against this the present Civil Revision Petition is filed.

Even the impugned order is not speaking enough. As to why the learned District Judge in revision differed from the finding of the Rent Controller that the petitioner needed the premises for his business, is not clear There is no discussion. It is equally unexplained as to why the earlier view of the learned District Judge that it was not possible to apply for a quota of iron for trade at Madurai without a business place for the purpose, was not referred to He completely failed to consider the case of the petitioner that the premises was required for the sons' business I shall advert to the merits of the case later.

The preliminary objection of the learned Counsel for the respondent is that in revision, this Court ought not to interfere on finding of facts of the learned District Judge The scope of the proceedings under section 25 of Act XVIII of 1960 has been repeatedly held to be wider than that available to this Court in revision under section 115, Civil Procedure Code. Whereas under section 115, Civil Procedure Code, interference is possible only on matters of exercise of jurisdiction, under section 25 of Act XVIII of 1960 (The Madras Buildings (Lease and Rent Control) Act, 1960), the legality, regularity and propriety of the order impugned can be canvassed in the High Court If therefore the High Court can probe and find whether an order of the lower Court is regular or proper, then it follows that the High Court can, in suitable cases, interfere with findings of fact as well, if they are *prima facie* unsustainable, irregular and improper, and disgorge such factual finding

apparent on the face of the order. The Supreme Court in *Moti Ram* v *Suraj Bhan*[1] expressly opined that the propriety or legality of the finding as to the requirement of a landlord for reconstructing the demised premises etc, can be canvassed in the High Court under a provision similar to that of section 25 of the Act. The test has been correctly reiterated by Ramamurti, J., in *Khivraj* v *Maniklal*[2], thus

> " While interfering with findings of fact the test to be adopted is that if an order is found to be improper on the evidence on record the High Court will be doing the right thing in setting aside the order of the lower Court ; if the improbabilities, which induced the lower Court to reject the positive evidence were to be eschewed or excluded from consideration and there is no further ground exigible from the expressed reasoning of the lower Court or from the rest of the record to justify the order passed by it, the High Court will interfere in revision "

In the view that I hold that the learned District Judge failed to advert to the evidence as let in the case and as his improbable conclusions have to be eschewed and the Rent Controller's finding that the petitioner required the building has to be upheld, I am unable to accept the preliminary objection.

Before referring to the abundant case law available on the subject under consideration, it is convenient to notice the salient ingredients of section 10 (3) (*a*) (iii) of the Act. They are (1) the landlord requires the premises; (2) that such requirement is for purposes of a business which the landlord or his son is carrying on; (3) that such a requirement is *bona fide*; and (4) he is not occupying another building of his own in the same city, town or village in which the suit premises is situate. The word ' requirement' is not equatable to a mere wish, convenience or whim of the landlord. An element of " must have " is inhered in it A mere unbridled or arbitrary liking on the part of the landlord is not sufficient. The test appears to be that if an outside agency is called upon to express an opinion whether the landlord needs or requires the premises, it should return, a verdict that having regard to the circumstances of a given case and bearing certain objective standards in view, the need is genuine, honest and not prompted by a collateral purpose. It should however be borne in mind that the landlord is the sole arbitor of his requirements. Ultimately the opinion of a well-instructed Judge on the subject has to rest on the sincerity of the desire, the genuineness of the wish and the reality of the situation as established in evidence. Closely allied with the element of " genuine requirement " is proof of *bona fides* on the part of the landlord. *Bona fides* of an individual is reflected in his conduct and his request and invariably if the requirement is found to be genuine, honest and not tainted with an oblique purpose, then *bona fides* normally spring from it The other element constituting section 10 (3) (*a*) (iii) is that the premises is required for a business which the landlord or his son is ' carrying on". There is no measure to reckon the activities covered by the expression "carrying on business". The very term comprehends an act or mercantile pursuit. The Legislature having not indicated the range of such pursuit or the nature of such acts, it is for the Courts to judge from the facts of each case, (*a*) whether they could be fairly and normally characterised as a present intendnent on the part of the landlord to carry on a trading pursuit after having made *bona fides* preparations for the same, though it is not necessary to establish that he has enough capital to enter into the business; (*b*) that he has started in right earnest a trade, and (*c*) that his intentions are not obscure and motivated. If the landlord or his son is already carrying on a business, then the problem becomes easier, for in such a case, the question is whether the need is genuine.

Having thus analysed the section, I shall notice the precedents cited at the Bar in support of their respective contentions The following propositions are deducible from them :

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1. (1960) S C J. 699 : (1960) 2 S C.R. 896 A.I.R 1960 S C. 655.

2. I L R. (1966) 1 Mad. 431 A.I.R. 1966 Mad. 67.

(*a*) There is no yardstick by which we can measure the range of activities necessary to constitute the carrying on of business. Viswanatha Sastri, J., in *Venkataswami & Sons* v. *Virabhadraswami*:[1]

(*b*) Carrying on business need not necessarily mean that there is an active and vigorous trade. It is enough if all the preparations have been made. Panchapakesa Ayyar, J., in *Nataraja Achari* v. *Balasubramaniam*[2].

(*c*) If *bona fide* preparations for a business is afoot, the business may be regarded as being carried on in many cases. Balakrishna Ayyar, J., in *Az mudeen Sahib v. Rangaswami Pillai*[3]

(*d*) Merely because a person had done certain business in the past and intends to do similar business in future, he cannot be said to be 'carrying on a business' Subramanyam, J., in *Krishna Iyer* v. *Karur Vysya Bank*[4] :

(*e*) It is irrelevant to consider whether he has invested a sufficient sum or that he should have invested more. It is equally irrelevant to consider whether the turnover of the business is small or large. Venkatadri, J., in *Arumugha Nattar* v. *Hussain Moideen Khan*[5].

(*f*) It is not necessary for the purpose of 'carrying on a business' within the meaning of section 10 (3) (*a*) (iii) of the Madras Buildings (Lease and Rent Control Act, 1960, that the entire activity of a business should exist. Section 10 (3) (*a*) (iii) of the Act would cover the case where the authorities come to the conclusion that the demand for occupation is a *bona fide* one and that the landlord has already commenced some activity in connection with the starting of the business.

There is no reason why a landlord having the capital ready and the intention as well to do business cannot be said to have commenced his business, though the activity relating to it has to await the securing of accommodation. Ramachandra Iyer, C. J., in *Ramaswamy Pillai* v *Karmega Thevar*[6]

(*g*) 'Carrying on business' is essentially a question of fact or a mixed question of fact and law and each case has to be decided on its own facts and no general proposition of law can be evolved. Even construing the term most liberally in favour of the landlord it cannot be said that the mere fact that a licence has been obtained from the municipality to run a flour mill can by itself satisfy the pre-requisite conditions to evict a tenant under section 7 (3) (iii) of the Madras Buildings (Lease and Rent Control) Act, 1949. When there is no evidence that the landlord has purchased the requisite machinery or plant for erecting a flour-mill or has done any other business activity necessary to start a new venture the mere obtaining of a licence will not entitle the landlord to come within the requirements of law to evict the tenant Jagadisan, J., in *Govinda Chettiar* v. *Pachayappa Pandithar*[7].

(*h*) The business which the landlord's family is carrying on, cannot be regarded as a business which he is carrying on, and if he has to be regarded in his individual capacity, he is certainly not carrying on any business. Sriniv asan, J., in *Subramania Naidu* v. *Mohammed Zyauddin*[8].

Thus the case-law is abundant and at once varying The general principle noticeable in the majority of cases appears to be that *bona fide* preparation to do business at the place where the tenant is trading coupled with an honest and a genuine need for the same would entitle a landlord for an order under the section. In the instant case the finding is that the petitioner was carrying on business on the date of the application and his requirement of the premises in question at Madurai is

1. (1955) An W R 695
2 (1957) 2 M L J 492
3. (1958) 2 M L J 389
4. (1959) 2 M L J 215
5 (1964) 1 M L J 386
6. (1964) 2 M L J 89 · I L R (1964) 1 Mad 712.
7 (1960) 2 M L J 382.
8 (1968) 81 L W. (Sh N.) 34.

real This finding was not adverted to by the appellate authority or the revision authority Further, the petitioner has said that his sons, who were admittedly trading in trunk boxes, required the premises Hence the petitioner has proved that he required the premises for a business carried on by him or by his sons. The one main limb of the section is satisfied The Courts below have also noticed that in the peculiar circumstances, no application for quota could be made at Madurai without a business premises The landlord's intention to get the premises cannot be lightly characterised as non-genuine or for an oblique purpose The vague suggestion that there is enmity between the petitioner and a partner of the respondent firm stands only as a bare suggestion Applying the tests laid down by Panchapakesa Ayyar, J. Balakrishna Ayyar, J , and Ramachandra Iyer, C. J., I hold that the desire of the landlord in the instant case is not a mere wish but was reflection of a genuine desire to occupy, for his business, the Madurai premises for which he was prepared, as far as he could.

Even considering the business carried on by the sons at Dindigul, it can reasonably be concluded that for that business at least the premises was required Regarding the question of *bona fides* it is now made clear in *N Sampathu Chetty* v *S. V. Bapulal*[1], and *Anandhayee Ammal* v. *S. M Khaja & Co*[2], that *bona fide* means :

> " . . in cases under section 10 (3) (*a*), the landlord honestly desires to occupy the premises from which eviction is sought and his claim is not a device to serve an oblique purpose,"

Bona fides is alien for consideration unless it is proved that there is a device in the proceeding other than honest

> " Where there is a foundation or reasonable material for a Judge to come to the conclusion that there is a business either by the landlord or landlady or his or her son, as the case may be, and it is for that business that the premises is required, there is no reason why the Tribunal should not apply strictly section 10 (3) (*a*) (iii) which makes it clear that the landlord would as a matter of course be entitled to it once that requirement is established It is not necessary that the son should carry on a business in the city, town or village in which the property is situate to enable the father or mother to apply under section 10 (3) (*a*) (iii) "

In the instant case no question of *mala fides* arises

One other factor also has to be incidentally referred to The Legislature in its wisdom has provided against improper evictions by unscrupulous landlords by providing a safety valve in section 10 (5) (*a*) of the Act, which enables the tenant to ask for restitution in case the landlord fails to occupy the premises. Section 10 (5) (*a*) is similar to section 16 (1) of the Act The latter provides a right to the tenant to occupy if the building is not demolished as represented , the former provides a similar right to the tenant if the building is not occupied within one month of the date of obtaining possession or having occupied it vacates the same without reasonable cause within six months from that date With this safeguard duly provided in the Act and in the conspectus of the facts in the instant case and having regard to the real need of the petitioner and/or his sons, I am of the opinion that the order of the learned District Judge is irregular It is therefore set aside and this Civil Revision petition is allowed The respondent is given time till 31st December, 1969, to vacate the same There will be no order as to costs

S.V.J *Petition allowed*

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1. (1967) 1 M L J. 289. 2 I L R (1968) 3 Mad 284 (1967) 1 M L J 368.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Chief Justice*, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M NATESAN

(In the matter of instrument dated 16-9-1964 executed by Messrs Simpson and General Finance Company Limited, Madras and surcharge leviable thereon under section 135 of the Madras City Municipal Corporation Act, 1919 and referred to under section 57 of the Stamp Act

The Chief Controlling Revenue Authority,
Board of Revenue, Madras . *Petitioner**

v

Simpson and General Finance Co., Limited, Madras .. *Respondent.*

Stamp Act (*II of* 1899), *section* 9 *and Madras City Municipal Act,* (*IV of* 1919), *sections* 98 *and* 135—*Instrument transferring immoveable properties—Exemption granted from stamp duty under Stamp Act—Levy of surcharge on such instrument by Municipal Corporation.*

The question for decision was " whether an exemption granted under section 9 of the Stamp Act can amount to an exemption from payment of surcharge leviable under section 135 of the Madras City Municipal Corporation Act, 1919 and whether the instrument referred to " is so exempt from payment of surcharge duty also "

Held, section 98 (*h*) Madras Municpal Act itself makes it clear that the duty cannot be levied, in the case of an instrument, which is not liable to duty at all under the Stamp Act. The tax is an additional tax or burden upon a pre-existing tax under the Stamp Act, and could be appropriately levied, only where the instrument is liable to duty under the Stamp Act and not otherwise. Where there is an instrument, which is not at all liable to stamp duty under the Indian Stamp Act, no surcharge could be levied, because, in law, this duty under section 98 has to be "in the form of a surcharge on the duty imposed by the Indian Stamp Act " Where the tax or charge itself cannot be levied on the grounds of a statutory exemption, the question of imposing a further surcharge cannot legitimately arise

Held, on facts, so long as that exemption is enforced, the instrument cannot either be taxed to duty under the Indian Stamp Act, or made the subject of surcharge thereon by the Madras City Municipal Corporation Act.

Case referred to the High Court by the Chief Controlling Revenue Authority, Madras under section 57 of the Indian Stamp Act, 1899 in the matter of instrument, dated 16th September, 1964 executed between M/s Simpson and General Finance Co , Ltd., Madras and M/s Simpson and Co , Ltd , and the levy of surcharge on the said instrument, for the decision of this Court as on the following question of law, namely :

" Whether an exemption granted under section 9 of the Stamp Act can amount to an exemption from payment of surcharge leviable under section 135 of the Madras City Municipal Corporation Act, 1919 and whether the instrument referred to is so exempt from payment of surcharge duly also "

The Additional Government Pleader, for Referring Officer

C S. Padmanabhan, for *M/s. King and Patridge*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C J—The point involved in this Reference is a short but an interesting one Under section 9 of the Indian Stamp Act, 1899, there is a statutory power in the Government, not merely to reduce the stamp duty upon any particular category of instruments, but to remit the stamp duty altogether. Since the provisions of any Act have to be read harmoniously, as far as possible, section 9 has clearly to be construed as a limitation or restriction upon the scope of section 3, which is the charging section, and which specifies the instruments chargeable with

* R C No 2 of 1966 28th January, 1969

duty under the Act. This power under section 9 is to be exercised, according to the Legislature, " by rule or order published in the Official Gazette." Under section 76 (2) of the Stamp Act, "All Rules published as required by this section shall, upon such publication, have effect as if enacted by this Act". The facts in the present case are not in dispute The Respondent (Messrs. Simpson and General Finance Co, Limited, Madras) executed an instrumnnt dated 16th September, 1964 (Exhibit A) transferring certain properties in favour of Simpson and Company, which is a subsidiary Company of the Respondent concern. This instrument is not liable to stamp duty, as it is totally exempted by the exemption No. 58 of Government Notification No 13 dated 17th December, 1938. Under those circumstances, we must certainly construe this exemption as part of the Rules, and an integral part of the Act itself, by virtue of section 76, so that the clear consequence is that this instrument has been totally removed from the ambit of the provisions of the Stamp Act.

We may now proceed to the point immediately in issue. The Madras City Municipal Corporation Act (IV of 1919), contains two important provisions, with regard to the power of the Local Body to levy transfer duty upon instruments relating to transfers of immovable property, within its jurisdiction. Section 98 is the source of power, and it is in the following terms :

> " The Council may levy—
>
> (*a*) to (*g*) * * * *
>
> (*h*) a duty on certain transfers of property in the shape of an additional stamp duty "

This is the source of the taxing power Actually, the taxing provision is in section 135 of the same Act, and section 135 (*a*) runs as follows :

> " The duty on transfers of property shall be levied—
>
> (*a*) in the form of a surcharge on the duty imposed by the Indian Stamp Act, 1899, as in force for the time being in the State of Madras, on every instrument of the description specified below, which relates to immovable property situated within the limits of the City "

Section 135 (*b*) need not be set forth verbatim here, but we may note that this sub-section relates to the rate at which this surcharge is to be levied, and it indicates that the rate may be as "fixed by the State Government, not exceeding five per centum, on the amount specified below against such instrument. Under this follows the enumeration of the description of instruments, namely, sales, exchanges, gifts and mortgages with possession, of immovable properties The amount on which the duty should be levied is stated as, respectively, the amount or value of the consideration for the sale, as relating to sales, the value of the property of the greater value, as relating to exchanges, the value of the property, as set forth in the instrument of gifts, and the amount secured by the mortgage, as relating to mortgages.

The present Reference arises from a doubt felt by the concerned Authority, whether, notwithstanding the exemption granted under section 9 of the Stamp Act, which as we observed, takes that instrument out of the ambit of the Act altogether, the Madras City Municipal Corporation may, nevertheless, be entitled to levy a surcharge on the amount forming the value of the consideration, under section 98 read with sections 135 (*a*) and 135 (*b*) of the Act. The simple answer to this question depends upon our interpretation of sections 98 and 135 (*a*) and (*b*), as those relevant provisions do specify the source of the power to levy the tax, and also the character and basis of the tax in question.

We have very carefully considered this question. In our view, section 98 (*h*) itself makes it clear that the duty cannot be levied, in the case of an instrument, which is not liable to duty at all under the Stamp Act. For, the relevant words are :

> " a duty on certain transfer of property in the shape of an additional stamp duty."

These words, we think, render it clear beyond doubt that the tax is an additional tax or burden upon a pre-existing tax under the Stamp Act, and could be appropriately levied, only where the instrument is liable to duty under the Stamp Act, and not otherwise The point in issue is rendered even more definite by the words of section 135 (*a*), namely, that the duty is to be levied " in the form of a surcharge on the duty imposed by the Indian Stamp Act, 1899, as in force for the time being in the State of Madras." These words, considered together, clearly imply that where there is an instrument, which is not at all liable to stamp duty under the Indian Stamp Act, 1899, as in force for the time being, no surcharge could be levied, because, in law, this duty under section 96 has to be " in the form of a surcharge on the duty imposed by the Indian Stamp Act " Undoubtedly, under section 135 (*b*), the rates make it clear that this surcharge is not to be a proportion of the stamp duty itself, but will be a rate on the amount of the consideration or the value of the concerned property, not exceeding five per cent. The learned Additional Government Pleader brings it to our notice that, as the facts stand to-day surcharges do exceed the duty leviable under the Stamp Act But, it is clearly essential that the instrument should be liable to duty under the Stamp Act, before the power under section 98 could be invoked, to lay an additional burden, or before, any surcharge itself could be formulated and enforced.

The argument *per contra*, of the learned Additional Government Pleader would not merely be illogical, but would lead to the manifest absurdity that even with regard to instruments, which are not at all liable for duty under the Stamp Act, it may be upon grounds of public interest or public policy, a body like the Municipal Corporation, could still claim a power, independently, to tax that property, ignoring such public interest or ground of public policy We have no reason to think that that was ever the intendment of the Legislature Certain arguments were also addressed upon the meaning of the word ' surcharge ', and we have been at some pains to scrutinise the standard Law Lexicons and Dictionaries. But, we find that what is probably the most happy and appropriate elucidation of this expression is by Ramachandra Iyer, J , (as he then was), in *Rajagopalachariar* v *State of Madras*[1] in the following words. The learned Judge said :

" The word ' surcharge ' implies an excess or additional burden, or amount of money charges "

In the one enactment, of a parallel kind, to which our attention has been drawn, namely, the Madras Local Revenue (Surcharge) Act (XXIX of 1954), we find the word employed in the very same sense, and actually, under this provision, surcharge is to be a proportion of the charge or land revenue, at a specified rate. Under *Explanation* (1) to section 3, land revenue remitted " shall not be deemed to be land revenue payable for the purpose of this section ". That is another instance of the principle that, where the tax or charge itself cannot be levied on the ground of a statutory exemption, the question of imposing a further surcharge cannot legitimately arise. Our attention has also been drawn to an early judgment of this Court in C S.Nos. 449 of 1917 and 196 of 1920, but we find nothing in that judgment contrary to the view that we have expressed ,and, indeed, by implication, it strengthens the inference that we have drawn.

We are, therefore, clearly of the opinion that the taxing power in this case cannot be exercised by the Madras City Municipal Corporation, for the simple reason that this power is to impose an additional burden or tax or surcharge ,whatever it might be termed, further to the duty levied under the Stamp Act, and this is a case in which the instrument itself is beyond the ambit of that Act, by the force of a statutory provision So long as that exemption is enforced, the instrument cannot either be taxed to duty under the Indian Stamp Act, or made the subject of surcharge thereon by the Madras City Municipal Corporation Act. The Reference is answered accordingly. No order as to costs.

S.V.J. ——— *Reference answered accordingly.*

1. I L.R. (1959) Mad. 1073 · (1959) 2 M L J. 344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—MR. JUSTICE A. ALAGIRISWAMI.

Pakkle alias D. Parvathi Nadar and others .. *Appellants**

v.

P. Aiyasami Ganapathi and others *Respondents.*

Easement—Plaintiffs having a common right over water in tank belonging to village—Pollution of water by defendants—Suit for injunction—Maintainability—Proof of actual damage if necessary—Fact that water is also polluted by others—If can be a defence.

Once it is established that the villagers have a common right over the water in the tank for purposes of using it for their bathing and drinking purposes, any interference with that right would give them a cause of action, even though the interference is not in respect of a land belonging to the plaintiffs The action of the defendants would amount to nuisance

Of course, while in the case of riparian owners relief may be obtainable by the mere fact of the pollution even though there may not, in fact, be any sensible inconvenience or reduction of the comforts of the riparian owner, in the case of persons, who merely have a right over a property not belonging to them, damage in fact, would have to be proved.

The plaintiffs would be entitled to an injunction even though the land in respect of which they claimed injunction is not owned by them and the only right which they have is a common right over the property belonging to Government and it is no defence to the action that the people other than the defendants have already done something which had the effect of making the water in the tank brackish.

It cannot be said that in the present case the plaintiffs have been guilty of such an amount of acquiescence as would disentitle them to an injunction ; nor can the damage to them be compensated by money It cannot also be said that owing to the polluting matter poured into the tank by persons other than the defendants the plaintiffs could never be restored to the rights which they have established.

Appeal against the decree of the Sub-Court, Tuticorin, in A.S. No. 48 of 1963 preferred against the decree of the District Munsif, Tuticorin, in O.S. No. 361 of 1961.

R. G. Rajan, for Appellants.

T. R. Thyagarajan, for 1st Respondent.

The Court delivered the following

JUDGMENT.—The appeal arises out of a suit filed by the plaintiffs in a representative capacity on behalf of the villagers of Pottalkadu to restrain the defendants from laying salt pans in the bed of the suit tank thereby making the water in it useless to the people for bathing and taking drinking water The defendants contended that the plaintiffs are not the representatives of Pottalkadu village, that the suit land is not a tank, that only during the rainy season there used to be stagnation of water in the pits, that the villagers used to take water from another tank, that there are salt pans all round the suit land, and that the suit land is fit only for raising salt pans and that there is no drinking water in that locality. The trial Court held that some of the villagers used to take water from the suit tank, that the cattle also used to drink water from it and that the villagers used to take bath and wash their cattle therein. All the same, it took the view that as during the past about ten years, a number of persons have laid extensive salt pans almost on all the sides of the suit tank with the result that even if the rain water were to gather and flow into the suit tank, it cannot

* S A No 160 of 1964 5th January, 1968.

but be saltish and it cannot be said that water has become saltish because of the defendants laying salt pans in a portion of the suit tank and therefore, the plaintiffs were not entitled to the relief of injunction asked for against the defendants On appeal, the lower appellate Court held that the property in dispute is a tank and it has been recognised and used as such by the villagers in general and that the question as to whether the water from the tank is fit for domestic use or not is foreign to the scope of the present enquiry, but that the question is whether the defendants, though they are some of the villagers, are as of right entitled to convert the property or any portion thereof into salt pans that they are not so entitled and therefore an injunction as prayed for can issue Hence it allowed the appeal and decreed the suit.

In this Court it is urged on behalf of the appellants that the suit tank being a Government property and not the property of the villagers in general, there can be no injunction restraining the defendants from converting the bed of the suit tank into salt pans, and that it is for the Government, who are the owners of the tank to prevent the defendants from doing anything on their property. There is no doubt that the suit property is tank promboke There is no doubt either that the plaintiffs have no proprietary rights in it, even though a committee of the village might have been looking after it , nor have the defendants any permission granted to them to use the tank bed for purposes of converting it into salt pans. There is also no doubt, as held by both the Courts below, that the water in the suit tank has been used by the villagers in general It is also reasonably clear from the evidence that the water must have been so used from time immemorial Even so, the learned appellate Judge is not correct in saying that the question whether the water from the tank is fit for domestic use or not is foreign to the scope of the enquiry and the only question is whether the defendants are, as of right, entitled to convert the property or any portion thereof into salt pans. The plaintiffs not being the owners of the land, are not entitled to an injunction restraining the defendnts, unless some right of theirs is infringed Even if the defendants were unlawfully converting the tank into salt pans, it is a matter between them and the Government, who are the owners of the suit land The plaintiffs can have a cause of action, only if they had some right in the tank and therefore the view of the lower appellate Court on this part of the case is not correct It was, therefore, urged on behalf of the appellants that the appeal should, atleast, be remanded to the lower appellate Court for giving a finding as to whether the plaintiffs have any right over or in respect of the tank as a finding on that point is necessary for a proper disposal of the appeal. I consider that it is unnecessary to remand the appeal for that purpose and I have, therefore, been taken through the evidence in this case by the Advocates on both sides and I am satisfied that the finding of the trial Court that some of the villagers used to take water from the suit tank, that their cattle also used to drink water from the same, and that they used to take bath and wash their cattle therein, is correct. But, naturally enough not everbody in the village have been using the water of the tank, nor is it necessary that it should have been so used before the villagers can acquire a common right in respect of the water in the tank. That there used to be water in this tank is also clear from the evidence of D.W I, who says that the overflowing from the suit land will flow towards Mathikettan odai. It is difficult to accept the evidence of defendants' witnesses that during rainy season water used to spread in the suit land, but would drain off in the next day I am of opinion therefore, that the villagers have an immemorial right to the use of the water in the tank for their drinking and bathing purposes, as also for bathing and washing their cattle. It is also reasonably clear from the evidence that there is some water at least in the tank and that the water has become saltish The evidence on behalf of the plaintiffs clearly establishes this points ; it has not been seriously assailed or shaken by cross-examination. Though the water for drinking purposes seems also to be taken from other places in the village, it does not mean that the plaintiffs have no righ tover the water in the tank It is clear from the evidence on either side that the water is now saltish It is, however, urged on behalf of the appellants that there are salt pans all round and that must be responsible for the water in the tank becoming saltish and that

therefore, no injunction can issue in this cse. It is further urged that, in any case, the action of the defendants has only to a small extent, been responsible for the water becoming saltish and that therefore no injunction can issue. It is this argument that seems to have impressed itself on the trial Judge and to have been responsible for his dismissing the suit.

Once it is established that the villagers have a common right over the water in the tank for purposes of using it for their bathing and drinking purposes, any interference with that right would give them a cause of action, even though the interference is not in respect of a land belonging to the plaintiffs. The action of the defendants would amount to a nuisance. According to professor Winfield, a nuisance is an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it (Winfield, Law of Torts, 4th Edn., page 436). According to Clerk and Lindsell on Torts, 1947, nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (*a*) a right belonging to him as a member of the public, when it is a public nuisance, or (*b*) his ownership or occupation of land or of some easement, quasi-easement or other right used or enjoyed in connection with land, when it is a private nuisance. According to Salmond on Torts, 13th Edn., page 233—

"The pollution of a natural stream is a wrong actionable at the suit of any riparian owner past whose land the water so polluted flows, and, as we have just seen, pollution even of underground water is also actionable. The term pollution is here used in a wide sense to include any alteration of the natural quality of the water whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used. This, it is actionable to raise the temperature of the stream by discharging into it hot water from a factory, or to make soft water hard by discharging into the stream water impregnated with lime, no less than to pollute the stream by pouring into it the sewage of a town or the chemical refuse from a factory.... .... "

Then he states as follows at page 234 :—

" Pollution is actionable without proof of actual damage The lower owner has a right to the continued flow of the stream in its natural quality and any sensible alteration of this quality which renders the water less fit for any purpose is an actionable wrong even though the plaintiff has not in fact been prevented from making any use of the water which he has hitherto made or now desires to make of it. There is no right of " reasonable pollution "

According to Kerr, " Treat se on the Law and Practice of Injunctions ", 1927 Edn., page 217:

" A riparian owner is entitled to the flow of water past his land, in its natural state of purity underteriorated by noxious matter discharged into it by others and any one who fouls the water infringes a right of property of the riparian owner, who can maintain an action against the wrong doer without proving that the polluation has caused him actula damage and the action can be maintained even although other persons may have so fouled the water that the acts of the wrongdoer may not have rendered the water less applicable to useful purposes than it was before, for the damage is an injury to a right, and therefore actionable."

At page 238 it is observed as follows :—

" An injunction will be granted to restrain the fouling of a stream so as to render the water unfit for domestic purposes or for cattle to drink or for fish to live in it or for the purpose of manufacture, so also an injunction will be granted to restrain the discharge of heated water into a stream or the pollution of a water supply by the escape of gas. A riparian owner may maintain an action to restrain the pollution of a stream without proving that he has sustained actual damage by the wrongful act and the fact that the stream has been fouled by other persons is no defence to the action."

In *Wood and another* v. *Wand and others*[1], it was held :—

"A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state ; and if the water be polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first mentioned proprietor, it gives him a good cause of action against the upper proprietor unless the latter have gained a right by long enjoyment of grant"

Of course, while in the case of riparian owners relief may be obtainable by the mere fact of the pollution even though there may not, in fact, be any sensible inconvenience or reduction of the comforts of the riparian owner, in the case of persons, who merely have a right over a property not belonging to them, damage in fact, would have to be proved In the above said case, the wrongful act of the defendant made no practical difference, that is, the pollution by the defendants did not make it less applicable to useful purposes than such water was before But the Court held that notwithstanding that, the plaintiffs have received damage in point of law, as they had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which water course flowed as it was a case of an injury to a right. It may be that where one is not a riparian owner, but has only a common right, actual damage may have to be proved. In *Grossley and Sons Ltd* v *Lightolwer*[2], it was held that the fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one and that the owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him

At page 483, their Lordships says this .—

"From what has been already said, it may be collected that, in my opinion, if the plaintiffs had proved the pollution of the Hebble opposite to their mills by the defendants, they would have had good ground for an injunction, although they were not actually using the water for their business"

Thus, it would be seen that the plaintiffs would be entitled to an injunction even though the land in respect of which they claimed injunction is not owned by them and the only right which they have is a common right over the property belonging to others and it is no defence to the action of the plaintiffs that the people other than the defendants have already done something which has had the effect of making the water in the tank brackish

Reliance, is, however, placed by the appellants on three decisions. The first of them is one reported in *Attorney-General* v *Gee*[3] There at page 137 the following passage occurs.—

"This brings us to the question whether the nature and extent of the nuisance in this case is such that this Court ought to interfere by injunction to prevent it I have throughout felt this point to be of some difficulty. I adhere to the opinion which was expressed by me and by the Lord Chancellor in *Attorney-General* v *Sheffield Gas Consumers Co*[4], that it is not in every case of nuisance that this Court should interfere I think that it ought not to do so in cases in which the injury is merely temporary and trifling, but I think that it ought to do so in cases in which the injury is permanent and serious and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it."

It is urged that in this case the injury is neither permanent nor serious. I cannot agree It would be seen that in that very decision their Lordships go on to say further as follows :—

"The injury here is in the course of being abated in the manner I have pointed out. The injury when this information was filed, I am satisfied, was not greater

1 (1849) 3 Exch 748· 18 L J Ex 305
2. L R 2 Ch. App 478.
3 (1870) L R 10 Eq Cases 131
4. 3 D M and G 304.

or different to what it had been ten or twenty years before. Therefore, upon, these grounds, I am unable to see that there could possibly be any advantage derived by interfering by injunction "

In *Lillywhite* v. *Trimmer*.[1]

'Bill was filed to restrain a local board of health from discharging sewage into their river so as to be a nuisance and injury to the plaintiff The Court, finding that the plaintiff sustained no material injury and that the nuisance if any, had been to a great extent abated since the filing of the bill' remarked that in cases of this class, where important public interests are involved, such as the improvement of the drainage of a town, the Court will protect the private rights of the individual if affected in any material degree, but will at the same time have regard to the nature and extent of the alleged injury, or nuisance and to the balance of inconvenience That case can have no application to the facts of this case where it is not the right of a local board that is involved and the action of the defendants is based on no manner of right whatsoever in the land

The third case relied upon is the one in *Wood* v. *Sutcliffe*[2] There it was held that a person may by long use acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream, and may acquire a right to pour polluted matter into a stream as against all new comers, but that a person having established his right at law is not as a matter of course, entitled to an injunction, particularly where the injunction would not restore the plaintiff to the right he has established and where the act complained of may be compensated by pecuniary damages. It would be noticed from the above decision that a person can acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream This would help the plaintiffs But the appellants-defendants contend that a person having established his right is not, as a matter of course entitled to an injunction, particularly where the injunction would not restore the plaintiffs to the right they have established in this case because all around there are salt pans and the water in the tank would in any case become saltish The evidence in that case proved that owing to the increase of polluting matter poured into the stream from other sources than that of the defendants' works, the plainiff never could be reinstated in his original rights and that the damage might be compensated by money ; and that the plaintiff had been guilty of such an amount of acquiescence as would disentitle him to an injunction It cannot be said that in the present case the plaintiffs have been guilty of such an amount of acquiescence as would disentitle them to an injunction, nor can the damage to them be compensated by money The only question is whether owing to the increase of polluting matter poured into the stream from other sources than that of the defendant's work, the plaintiffs never could be reinstated in their original rights

At page 259 in the above decision it is observed as follows :—

" 'Adverting to what I conceive to be the conditions which must concur to induce this Court to interfere, the first question which arises is, whether assuming that damage is done by the defendant's works, the restraining of that damages will restore, or tend to restore, the plaintiffs to the right which they had originally of having the water clean to their works Now, as I have said, if it was only this, there is somebody else fouling the water besides me', the saying that would be no defence to such an application, but if by reason of the whole change in the condition of the surrounding country and neighbourhood the stream has become polluted to such an extent that it cannot be used for the purpose of the plaintiffs' works the granting the injunction to restrain this one wrong-doer, if he be such, from continuing his works would do no good to the plaintiffs It will not do them that good, the doing of which is alone the ground on which a Court of equity will use its strong power to interfere to restrain the defendant's works from going on If, notwith-

1 (1867) 36 L J Ch 525 16 L T. 318. 2 L.R. 21 Ch. N.S. 253.

standing a certain degree of pollution of the water, the plaintiffs can still use the water although not so usefully, and then the defendant pollutes it to make it so much worse that they can use it in a less effective manner than they did before, or if the degree of pollution existing, we will say, from Messrs Ripley's works, may be prevented by the plaintiffs by the same process which they were using against Mr Sutcliffs, if that were the state of the case, of course they would have a right to say, ' this is a case in which an injunction would restore, or tend to restore, us to the rights which we originally had with regard to the stream ' Now, there is nothing to shew me, and I am not able to say from the evidence before me, how far the non-user of Messrs Ripley of that extent of pollution which they have of late years caused to this water—how far, if they were away, the water is polluted by the other works (for there are a great many of them, and I have only three brought here before me particularly), or how far the pollution arising from those works would be so comparatively small as that the plaintiffs might continue to carry on their business effectively by using the water But I have this fact, that Messrs Ripley's increase of works has been comparatively recent, the defendant's dye works did not come into operation until the early part of 1845 Then, were the plaintiff, before the defendant's works came into operation, able to use the water of the stream for their works, either in the shape of using it for washing wool, or in the shape of using it in boilers Clearly not And, therefore, I think that affords a very strong ground for saying that the mere removal of the defendant's works, or preventing the defendant from carrying on his works in the manner in which he now does, really would not have the effect of causing the water of this stream to come down to the plaintiff's works in the same pure and unpolluted state, which the plaintiffs, according to their original right, ought to have. I do not feel sure, therefore, even if it turned upon this part of the case, that the granting of the injunction, while it would have the effect, if not of ruining the defendant, of doing him most serious mischief would, on the other hand, have the effect of benefiting the plaintiffs by restoring them, or tending to restore them to the rights which they contend for, and which I admit that they have "

It is not possible in this case to say that the plaintiffs can never be re-instated to their original rights The evidence in this case is not sufficient to hold that the existence of the salt pans or private lands round about has made the water in the ank so saltish that the injuncion restraining the defendants from laying salt pans would not have any appreciable effect on the quality of the water in the tank, It may be that if the Government permits the defendants to lay salt pans in the tank, circumstances might arise where the injunction might not be of any use But till that contingency arises, I think it cannot be said that the position has so far deteriorated that the plaintiffs cannot be reasonably restored to their original position There is no evidence in this case to justify such a conclusion. The plaintiffs are therefore, entitled to the injunction which they have prayed for. It follows that the judgment of the lower appellate Court allowing the appeal and decreeing the suit is correct.

The second appeal is dismissed without costs. Leave granted

V K *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE T. RAMAPRASADA RAO

N. Sivanandam .. *Petitioner**

v.

Tribuvendas Vendraven Bros., by power of Attorney Agent K Govindarajulu, and others . *Respondents*

Madras Buildings (Lease and Rent) Control Act (XVIII of 1960), *section* 10 (2) (*ii*) (*a*)—*Sub-letting and eviction—Tenant carrying on business in premises—Formation of a partnership to do the business—If amounts to sub-letting—Section* 25—*Powers of revision of a District Court—Limits—Civil Procedure Code (V of* 1908), *section* 115—*High Court—Revision against orders by District Court made in revision—Extent and scope of*

The tenant carrying on business in the premises, formed a partnership to continue the business The landlord filed an application under the Act for eviction of the tenant on the ground of sub-letting Under the deed of partnership the tenant was to render his wholetime attention to the partnership business and *inter alia* obligated himself not to do any other business during the subsistence of the partnership The rent for the premises was to be paid from the partnership funds The Rent Controller and the Appellate Authority found that the tenant did not part with the exclusive and legal possession of the premises. The District Judge in revision held that there was a totality of transfer of lease-hold interest to the firm and hence ordered eviction In a revision filed by the tenant to the High Court, under section 115 of the Civil Procedure Code,

Held: The question whether a tenant of a premises creates a partnership resulting in the admission of another to the possession of the premises, will amount to sub-letting or not will depend upon the intention of the parties and has to be decided on the facts and circumstances of each case

It is well established that the High Court exercising jurisdiction under section 115 of the Civil Procedure Code cannot correct a bare error of law or mis-judgment of the lower Court on a question of fact since such a decision was rendered by the subordinate Court in the exercise of its jurisdiction, but if the subordinate Court wrongly decides a jurisdictional fact then the consequential decision of the subordinate Court is liable to interference by the High Court exercising jurisdiction under section 115 of the Civil Procedure Code.

The revisional jurisdiction of the District Court under section 25 of the Act is no doubt wider in scope and content than that envisaged in section 115 of the Civil Procedure Code Nevertheless the limit of such revisional power under section 25 of the Act have been circumscribed and such powers cannot be exercised unless there are no materials to support a finding or a finding was based on irrelevant or inadmissible matter, or the finding was so perverse that no reasonable person could have reached that conclusion or a finding based on an erroneous understanding of the law

On facts: A fair reading of the partnership deed does not lead to the conclusion that the vested leasehold interest of the tenant in the premises has ever been divested by reason of the stipulation that the firm has to pay the rents When the tenant obliged himself to work for the firm only and has indeed precluded himself from doing other business during the subsistence of the partnership, the only irresistible conclusion is that he has a substantial interest in the partnership business The finding of the District Judge that there was a substitution of tenancy in favour of the firm has been reached by an erroneous understanding of the law of partnership applicable to the matter The concurrent findings of the Rent Controller and the Appellate Authority are not liable to be set aside by the District Judge in the exercise of his revisional jurisdiction

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* C R.P No 313 of 1966. 8th March, 1968.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Court, Coimbatore, dated 21st December, 1965 and made in C R P No 289/64 (R C A No 89/63 (Prl) Sub-Court, Coimbatore, R C O P No 461 of 1962, District Munsif and House Rent Controller, Coimbatore)

V P Raman and *N R Chandran,* for Petitioner.

V Rajagopalachari and *K Raja,* for Respondents

The Court delivered the following

JUDGMENT —The tenant is the petitioner in this Civil Revision Petition. Proceedings were initiated by the landlord respondent under section 10 (2) (*ii*) (*a*) of the Madras Buildings (Lease and Rent Control) Act, 1960, hereinafter referred to as the Act, for evicting the petitioner on the ground that he has sublet the premises to respondents 2 and 3 in this petition The petitioner was carrying on business in the suit premises in rice and other grains He along with the 3rd respondent and others who were not *eo nomine* parties to these proceedings entered into a partnership on 14th September, 1962, and the name and style of the partnership business was T V Veerappa Chettiar and Company, which is the 2nd respondent in this petition The first respondent filed the above application for eviction on the only ground that the petitioner has sublet the premises by associating himself with others as partners and for forming a partnership firm in the premises without the written consent of the first respondent.

It would be convenient at this stage to refer to the terms of partnership formed on 14th September, 1962 There were five partners of whom the petitioner and the 3rd respondent were two amongst them The *vilasam* of the partnership was " T V Veerappa Chettiar and Co " The petitioner was to be the working partner and he had no obligation to contribute capital The petitioner was to render his wholetime attention to the partnership business and *inter alia* he obligated himself not to do any other business during the subsistence of the partnership One other stipulation was that the rent for the suit premises of which the petitioner was the tenant, was to be paid from the partnership funds

As already stated, the above partnership started by the petitioner, 3rd respondent and others under the name and style of the 2nd respondent, started functioning from 19th September, 1962 P W 1 who was the attorney of the first respondent states the rental receipts for the subsequent months were issued in the name of the petitioner even though the first respondent knew about the alleged sub-tenant There is evidence that the rents were so paid by the petitioner in the months of October and November, 1962 The petitioner who examined himself as R W 1 would state that he was doing business in rice and other grains in the suit premises and that he joined others in the said business because he needed financial help He also speaks to the dissolution of the firm on 18th Novmber, 1962 The Rent Controller, on the above evidence and other materials placed before him, came to the conclusion that there is absolutely nothing to indicate that the petitioner parted with the exclusive and legal possession of the petition premises The appellate authority came to a similar conclusion and was of the view that there was no substitution of the tenancy in favour of the partnership and the partnership deed, Exhibit B-3, does not evidence anything other than that the first respondent took partners for carrying on the business which was carried on by him before Both the Rent Controller and the appellate authority relied upon the decision of Subba Rao, J , in *Rangamannar Chetty* v *Rangiah*[1] The first respondent took up the matter in revision under section 25 of the Act to the District Court, Coimbatore The learned District Judge was of the view that under Exhibit B-3, there was a totality of transfer of leasehold interest by the petitioner to the partnership firm and held that according to the recitals of the partnership deed it was the partnership that has become

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1 (1952) 1 M L J. 652.

entitled to be exclusively in possession of the suit premises from the date on which it was constituted and that there is nothing to show that the petitioner was retaining any control over the building He relied upon the decision of the Nagpur High Court in *Tansukhdas* v *Shambai*[1] He also adverted to the other features of the case and ultimately held that the order of both the Rent Controller and the appellate authority was not in accordance with law and allowed the revision petition As against this, the tenant has come up to this Court in revision under section 115 of the Code of Civil Procedure.

Mr V. P Raman, learned Counsel for the petitioner, contended that a reprobe into the materials on record and the documentary evidence before it was unjustified as the findings of the Rent Controller and appellate authority are clear and within the purview of law His contention is that Exhibit B-3, which is the main sheet anchor in this case for either party, does not disclose and much less establish that there has been a totality of a surrender of the leasehold interest by the petitioner to the partnership firm He relied upon the ratio in *Rangamannar Chetty* v *Rangiah*[2] He also referred to me by way of analogy to the case reported in *Devarajulu* v. *Thayaramma*[3]. That was a case where one of two partners after dissolution of partnership assigned to the other partner, the interest of the partnership, in the premises which had been taken on lease by the partners It was held by a Division Bench of this Court that it does not amount to a breach of a covenant prohibiting an assignment of a deed without the consent of the lessor. He also invited my attention to the decision of Rajamannar, C J , in *Sasivarna Thevar* v *Ponnu*[4], wherein the eminent Judge expressed his approval to the four conditions laid by Rajagopala Iyengar, J , under which a revisional authority would be entitled to interfere with findings of a Subordinate Judge The learned Counsel for the petitioner contends that the learned District Judge ought not to have disturbed the concurrent findings of the Rent Controller and the appellate authority.

Sri V Rajagopalachari contending contra argued that there are telling circumstances in this case which afford an indicia to sustain the order of the learned District Judge In particular he would submit that the stipulation enabling the partnership to pay the rents of the suit premises, the absence of any controlling interest in the partnership on the part of the petitioner, the interdict on the petitioner not to do any other business, are by themselves, sufficient to take away the case from the ratio of Subba Rao, J , in *Rangamannar Chetty* v. *Rangiah*[2]. and that therefore the petitioner is liable to be evicted Strong reliance was placed by the learned Counsel on *Associated Hotels of India Ltd* v *R N Kapoor*[5] and *Radhakishan* v. *Data Ram*[6] In the main the argument was that the circumstances of the case connote a total substitution of a new tenant by an overt act on the part of the petitioner which was admittedly without the written consent of the first respondent. This, the learned Counsel would say, tantamounts to surrender of exclusive possession of leasehold interest and extinction of such interest in the original tenant and these being violative of the express provisions of the Act, the petitioner should suffer eviction He also invited my attention to the decision in *Panduranga* v *Maruti*[7], and submitted that the Court cannot while exercising jurisdiction under section 115, correct errors of fact however gross they may be or even errors of law

I shall now advert to the last of the contentions of the learned Counsel for the respondent No doubt it is well established that the High Court, while exercising jurisdiction under section 115, Civil Procedure Code, cannot correct a bare error of law or a mis-judgment of the lower Court on a question of fact, since such a decision was rendered by the Subordinate Court in the exercise of its jurisdiction It is also equally well established that if for the purpose of exercise of such jurisdiction

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1 A.I R 1954 Nag 160
2 (1952) 1 M L J 652
3 (1949) 2 M L J 423: A.I R. 1950 Mad. 25
4 (1957) 1 M.L J 158.
5 (1960) 1 S C R 368 (1960) S C J. 453.
6 (1961) A L J 827
7 (1966) 1 S C J 1 (1966) 1 S.C.R. 102: A.I.R 1966 S C 153

by the Courts below, a jurisdictional fact has to be found and if in the course of such an investigation the subordinate Court wrongly decides on the existence or otherwise of a jurisdictional fact, then the consequential decision rendered by the Subordinate Court in question is susceptible to interference at the level of the High Court exercising revisional powers under section 115, Civil Procedure Code In the instant case it is no doubt true that the District Court was exercising revisional jurisdiction under section 25 of the Act which is indeed wider in scope and content than that envisaged in section 115, Civil Procedure Code Nevertheless Rajagopala Iyengar, J, has very rightly circumscribed the limits of a revisional authority acting under similar circumstances under the Madras Buildings (Lease and Rent Control) Act, (XXV of 1949) Under the Act of 1949 the powers of the Court exercising revision jurisdiction under section 12 (*b*) therein are *in pari materia* with the powers exercisable by the District Court under section 25 of the Act The learned Judge said :

> "The only proper way of defining the relative jurisdiction of the appellate and revisional authorities constituted under the Madras Buildings (Lease and Rent Control) Act is to hold that while an appellate authority is entitled to examine every question of fact and law dealt within, or arising out of, an order of the Rent Controller, a revisional authority, while undoubtedly can interfere with questions of law, where the Rent Control Act or any provision has been misconstrued, cannot normally interfere with findings of fact unless (*a*) there were no other materials on which such a finding could be based, or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter, or (*c*) it is so perverse that no reasonable person could have reached that conclusion, or (*d*) the finding had been reached by an erroneous understanding of the law applicable to the matter To hold that a revisional authority could interfere with findings of fact of an appellate authority without regard to these limitations would be to convert a revision into a regular appeal and to obliterate the distinction between appeals and revisions which the Act has taken care to provide"

The above passage was quoted with approval by Rajamannar, C J, in *Sasivarna Thevar* v *Ponnu*[1]

The learned District Judge in this case while differing from the concurrent findings of the Tribunals of the lower hierarchy, found for himself certain facts so as to vest in him the jurisdiction to decide and in particular enquired for himself whether the act of the petitioner can be characterised as sub-letting But for the finding of such jurisdictional fact by him, the learned District Judge could not have ordered eviction Whilst finding such a jurisdictional fact he acted erroneously by misunderstanding the law applicable in the matter Indeed the finding has been reached by a consideration of irrelevant matter In such circumstances the High Court is not bereft of authority even though it is acting under section 115, Civil Procedure Code I am unable, therefore, to acept the contention of the learned Counsel for the respondent that the order of the learned District Judge cannot be set aside in exercise of revisional jurisdiction of this Court

The learned District Judge placed considerable importance on three factors on which the arguments of the learned Counsel for the respondent rested in this Court. The first circumstances is that the partnership as an entity obliged itself to pay the rent instead of the petitioner Factually, however, in this case it was the petitioner who had paid the rents even after the formation of the firm and until its dissolution. Be that as it may, whether the stipulation of payment of rent by the petitioner tantamounts to substitution of the original tenant is the question A partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all This enterprise resulting out of such a co-ordinated relationship between persons is called a partnership firm A partner is the agent of the firm for the business of the firm Such being the incidence of the partnership, an agreement between the partners that the payment of rent should be channelised through the partnership does not mean that the peti-

1. (1987) 1 M.L.J. 158.

tioner is substituting the control over the leasehold interest in the suit premises in another. In this case there is no evidence as was the case in *Radhakishan* v *Data Ram*[1], wherein it was obvious that what was done by the tenant in admitting a third party to partnership was making him a partner in the tenancy as such. A fair reading of Exhibit B-3 does not lead to the conclusion that the vested leasehold right of the petitioner in the premises has ever been divested by reason of the stipulation that the partnership has to pay the rents.

The second stipulation that was pressed into service by the learned Counsel for the respondent was that the petitioner has no controlling interest in the partnership. It is to be noted that the petitioner constituted himself as the working partner of the firm and obliged himself to devote his whole-time attention therein. I do not agree with the extreme contention that only persons such as managing partner or a financial partner can be characterised as having a controlling interest in a partnership firm. The word ' controlling ' is relative in scope and it has to be understood with reference to the nature of interest undertaken by a partner in a firm. The decision in *Chaplin* v *Smith*[2], referred to in *Rangamannar Chetty* v *Rangiah*[3], was quoted by the learned Counsel for the petitioner in support of his argument. Therein the person assigned his business to a company of which he was the managing director and in which he had a controlling interest. In those circumstances it was held that there was no sub-letting. The learned Counsel for the respondent distinguished this case by pointing out that in the instant case, no such controlling interest is seen. When a person obliges himself to work for the firm only and has indeed precluded himself from doing other business, during the subsistence of the partnership (which is the third stipulation referred to above), the only irresistible conclusion is that he has a substantial interest in the partnership business. In this view, I am unable to agree that the three circumstances culled out by the learned Counsel for the respondent and adverted to by the learned District Judge to find the jurisdictional fact are sufficient to disturb the concurrent findings of the Rent Controller and the appellate authority.

Another important aspect of the case which prompted the learned District Judge to reverse the decision of the appellate authority was that according to him, the circumstances justify an inference that possession of the suit property was taken by the partnership firm to the exclusion of the petitioner. I am afraid that this finding of the learned District Judge is hit by conditions (*b*), (*c*) and (*d*) prescribed by Rajagopala Ayyangar, J., referred to above. No case has been made out by the landlord to bring home such extinction of such lease-hold interest on the part of the petitioner. The recitals in Exhibit B-3, cannot prompt a reasonable person to reach that conclusion. The finding of the learned District Judge that there was a substitution of tenancy in favour of the partnership has been reached by an erroneous understanding of the law of partnership applicable to this matter. Strong reliance was placed upon the decision in *Radhakishan* v. *Data Ram*[1]. That was a case where the learned Judge repeatedly found that the intention of the tenant in creating a partnership was to induct a partner in the tenancy and share in the tenancy. They found such an intention and finally observed at p. 830 :

" No hard and fast rule can be laid down as to whether in all cases of partnership the admission of another partner to the joint possession of the shop will or will not amount to sub-letting. Each case will depend upon its own facts."

My attention was drawn to the decision in *Associated Hotels of India Ltd* v. *R. N. Kapoor*[4]. In that case the Court was concerned with laying down the law relating to the distinguishing features of a lease in contradistinction to a licence. I do not think that in that case, Subba Rao, J., (as he then was in the Supreme Court) desired to whittle down or depart from the rule pronounced by him in *Rangamannar Chetty* v *Rangiah*[3]. On the other hand, he observed as follows:

" At one time it was thought that the test of exclusive possession was infalliable and if a person was given exclusive possession of a premises, it would conclusively

1. (1961) A.L.J. 827.
2. L.R. (1926) 1 K.B. 198.
3. (1952) 1 M.L.J. 652.
4. (1960) S.C.J. 453 : (1960) 1 S.C.R. 368.

But there was a change and the recent trend of *Errington* v. *Errington*[1], wherein Lord Denning ect summarizes the result of his discussion thus

t, although a person who is let into exclusive ered to be tenant, nevertheless he will not gative any intention to create a tenancy.'

Lane[2], considered the legal position and parties was the real test for ascertaining the page 1201, Somervell, L J , stated :

that would seem to have been found is, as one would depend on the intention of the parties '

L J., said much to the same effect at page 1202 :

The question in all these cases is one of intention : Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land' ."

It is therefore fairly clear that the matter has to be adjudged on the intention of the parties The learned District Judge did not bear this in mind, but re-discussed the evidence, did not apply the correct law and ultimately found a fact, thus vesting in himself jurisdiction to order eviction. The decision in *Rangamannar Chetty* v *Rangiah*[3], is still applicable to the facts of the case In my opinion, the only circumstances that the partnership should pay the rent does not take the instant case away from the ratio in *Rangamannar Chetty* v *Rangiah*[3], which is as follows :—

" There cannot be a sub-letting unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. To create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another Taking in other partners in his business by a lessee will not by itself constitute sub-letting and the lessee is not liable to eviction under the provisions of Madras Act (XXV of 1949) "

I am therefore unable to agree with the contentions of the learned Counsel for the respondent that the order of the District Judge is well founded. This Civil Revision Petition is therefore allowed with costs and the decision of the learned District Judge is set aside.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE M. NATESAN

M.G. Amirthalingam .. *Appellant**

v.

K P. Arunachalam and others . *Respondents.*

Contempt of Court—Injunction restraining the appellant (Advocate) from functioning as Managing Director—Appellant flouting the injunction—Failure of the appellant to bring the facts before the Court—Unconditional and unqualified apology—Appellant, if purged himself of the contempt of Court he had committed

In the present case, it is not the order which misled the appellant, and that is not in dispute But what might have presumably misled the individual concerned was the vigour of the subsequent events, such as the new Articles of Association, a fresh resolution of the Board and the approval of that resolution, and he might

1\. (1951) 1 All E R 149
2 (1952) 1 All E R 1199.
3 (1952) 1 M L J. 652.

* L.P.A.No. 59 of 1967. 9th July, 1968.

have *bona fide* thought that there was a new jural basis, n of the original injunction, on which he could function

It is very likely that the appellant thought *bona fid* function as Managing Director on the new jural basis, approved had been by the explicit intimation of the Company Law Board. it was his duty to have brought the facts to the knowledge of the have prayed for a modification or cancellation of the injunction, und of the rule He ought not to have taken upon himself the grave re of flouting the injunction, thinking that the breach would only be tech

The appellant has filed an affidavit, not merely expressing regret for his c but acknowledging that the error was a grave one which amounted in contempt of Court, and tendering an unconditional and unqualified apo for his conduct, and throwing himself on the mercy of the Court. Having reg to the circumstances of the standing, knowledge and experience of the appellant as a Advocate and his present apology, the interests of justice do not require that he should be mulcted in fine He has already learnt his lesson. By his unqualified apology he has purged himself of the contempt which he has committed

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr Justice Kailasam, dated 3rd November, 1967 and passed in C M P. No. 1114 of 1967 petition presented to the High Court to punish the respondent therein for contempt of Court committed by him in acting as Managing Director of the company—Rajeswari Mills Ltd , in violation of the order of injunction granted by this Court dated 10th March, 1965 and made in A A O No 20 of 1965—preferred to the High Court against the order of the Court of the Subordinate Judge of Vellore dated 22nd December, 1964 and made in I A No 668 of 1964 in O S No 140 of 1964.

V. Rajagopalachari for *A Venkatachalam*, for Appellant.

V. Thyagarajan for *T Raghavan*, for Respondents.

The Order of the Court was made by

Anantanarayanan, C J—Though this matter has had a very protracted history, in the light of the actual disposal that we propose to make of this appeal from the judgment of Kailasam, J., in C M A No 20 of 1965, it is sufficient to set forth only a few salient facts. Not merely this, but it is also desirable that we should be very concise in our observations, as the main litigation is still pending, and there are several controversies between the parties that have to be still resolved, upon the principles of Company Law relevant to the litigation.

We might commence with the interim injunction ordered by the Subordinate Judge's Court of Vellore on 7th November, 1964, in an interlocutory application in O. S No 132 of 1964, restraining the defendants from passing the proposed Resolutions 2 (*a*), 2 (*b*) and 2 (*c*) in the Agenda for the General Meeting to be held on 11th November, 1964. Admittedly on the forenoon of 11th November, 1964, only other non-controversial resolutions were passed, and the consideration of items 2 (*a*), 2 (*b*) and 2 (*c*) was adjourned to the afternoon The interim injunction was vacated by the Court that forenoon and the resolutions were passed in the afternoon On 23rd November, 1964, the plaint in O S No 140 of 1964 was filed for a declaration that the Managing Agents were entitled to continue as such, and that the Resolutions 2 (*a*), 2 (*b*) and 2 (*c*) were invalid It is important to note that the prayer was, as far as the present appellant is concerned, (then second defendant), to restrain him from functioning as Managing Director in pursuance of these resolutions.

C M A No 20 of 1965 arose out of the dismissal of an application for interim injunction, and I A No 486 of 1965 was also filed in that proceeding in this Court. The High Court's order of injunction was passed on 10th March, 1965 On 6th March, 1965, the period of six months from the death of Mr Govindaraja, one of the partners of the Managing Agency firm, expired and the Company Law Board

declined recognition of the Managing Agency. It was under those circumstances that the learned Judge (Kailasam, J.) before whom the matter came up in C M A. No 20 of 1965, referred to the argument of Sri V. Thyagarajan, that the resolution was ineffective because of the prohibition under section 269 of the Act, and confirmed the injunction against the second respondent (present appellant) from functioning as Managing Director On 29th July, 1965, the Company Law Board approved of the appointment of the appellant as Managing Director, under section 269 of the Act C M P No 9636 of 1965 taken out for vacating the injunction under the changed circumstances, was dismissed by Kailasam, J, observing that the proper course for the petitioners was to file a fresh petition in the trial Court for vacating the injunction

It is very important to note that the terms of the actual injunction by Court, which has been produced before us, are absolute *pendente lite*, and though the plaint itself refers to injunction in respect of the Resolutions 2 (*a*), 2 (*b*) and 2 (*c*) passed at the meeting on 11th November, 1964, the injunction granted by the Court is not qualified by any such language The only meaning therefore can be that, whether in pursuance of these resolutions, or whether purportedly acting on the basis of subsequent events, the appellant before us, who is an Advocate of Court, was restrained from functioning as Managing Director *pendente lite* Had circumstances transpired which, according to the appellant, made a substantial difference, by providing a basis for his functioning other than the basis of the resolutions earlier referred to, the only proper remedy of the appellant, consistent with his status as a legal practitioner and the consideration to be paid by him to the authority and dignity of Court, would have been to move the Court which passed the injunction to modify its terms, in the light of further events Under Order 39, rule 4, Civil Procedure Code, such a specific procedure exists, and there can be no doubt whatever that, if the party did not function in this manner, but acted on his own presumed interpretation of subsequent events, however *bona fide* he might be, he ran, and does run, the grave risk of being committed for contempt of Court. As Kailasam, J, observed .

> "The order of injunction was in absolute terms, and it is not permissible for the respondent to construe the order in a manner that would suit him. The failure of the respondent to move the Court for cancellation of the order of injunction proves his intention to act as the Managing Director in spite of the orders of this Court The conduct of the respondent clearly amounts to contempt of Court...."

We need not be taken as fully approbating the dictum of the learned Judge, with respect, that the failure of the present appellant to move the Court for cancellation of the order of injunction, amounts to any proof of his intention to flout the orders of the Court We have gone very carefully into the facts and probabilities, and we are convinced, on the contrary, that such was not his intention.

But even if we accept his explanation that he was misled by the vigour and force of the subsequent events into believing that his right to function as Managing Director had a new jural basis, and further the sanction by the Company Law Board which was beyond the ambit of the injunction, his true remedy, the injunction being absolute in its terms, was to move the Court for its modification If he chose, on his own interpretation of events, to act as Managing Director without the knowledge or leave of the Court, he certainly was in jeopardy of being convicted for contempt.

This is the essence of the situation, and it is not really necessary to proceed into any of the other facts at any very great length As the appellant points out, after about one and half years from the original event, there was a fresh resolution passed by the Board, in the exercise of their power under the new Article of Association brought into force on 23rd June, 1966. This fresh resolution again empowered the appellant to act as the Managing Director and we find from the record that the Company Law Board definitely expressed the opinion that the original permission or withdrawal of any objection to the functioning of the appellant as Managing Director, enured for the benefit of this resolution also. Hence, it is very likely that.

the appellant thought, *bona fide*, that he could function as Managing Director on the new jural basis, approved as the resolution had been by the explicit intimation of the Company Law Board But, even so, the injunction stood unmodified and was unqualified in its terms and his duty, particularly as an Advocate, whose very profession is the learned one of co-operating in the administration of justice and ensuring the spirit of the rule of law, enjoined upon him the task of acquainting the Court with the facts and obtaining a modification of the injunction

He did not do this, but acted against the injunction and was hence convicted of contempt of Court, even if the basis be technical As was pointed out in a very early case, *Stockes* v *Banbury Board of Health* [1], and we do not think that the pith and substance of the matter could be expressed in more adequate terms —

> ". . the simple and only view is that an order must be obeyed and that those who wish to get rid of that order must do so by the proper course, an appeal So long as it exists, the order must be obyed, and obeyed to the letter, and any who does not obey it to the letter is guilty of committing wilful breach of it, unless there be some misapprehension which all mankind are subject to and which may mislead him (concerned individual) upon a plain reading of the order."

In the present case, it is not the order which misled the appellant, and that is not in dispute It is clear and unambiguous, both in the context of facts in which the order was passed, and in its terms But what might have presumably misled the individual concerned was the vigour of the subsequent events, such as the new Articles of Association, a fresh resolution of the Board and the approval of that resolution, and he might have *bona fide* thought that there was a new jural basis, not within the mischief of the original injunction, on which he could function But we must repeat that if he felt thus, it was his duty to have brought the facts to the knowledge of the Court, and to have prayed for a modification or cancellation of the injunction, under the terms of the rule. He ought not to have taken upon himself the grave responsibility of flouting the injunction, thinking that the breach would only be technical.

The appellant is an young man, with about eight years experience at the Bar After finding him guilty of contempt of Court, the learned Judge (Kailasam, J) has imposed on him a fine of Rs. 1,000, taking the view that this is a wilful breach. We are of the view that there are extenuating circumstances, and that there may be a large element of *bona fides*, in the misapprehenion in the mind of the appellant about his further plain duty, both to himself and to Court The appellant has today filed an affidavit before us, not merely expressing regret for his conduct, but acknowledging that the error was a grave one which amounted in fact to contempt of Court, and tendering an unconditional and unqualified apology for his conduct, and throwing himself on the mercy of the Court In our view, having regard to the circumstances of the standing, knowledge and experience of the appellant, and his present apology, the interests of justice do not require that he should be mulcted in fine. He has already learned his lesson We accept the unqualified apology, and hold that he has thereby purged himself of the contempt which he has committed The appeal is allowed to this extent. No costs. The fine if paid will be refunded.

We need not express any further view But since the learned Counsel have invited us to do so, we are doing so here, that it follows, without the need to state it, that the appellant ought not to function a moment further as Managing Director of the firm in the light of the existing absolute injunction If he desires to , so function on any alleged new jural basis, he has a to move the Sub-Court under the relevant rule for modification, or cancellation of the injunction Needless to say, any such application has to be subject to all such objections that may be raised thereto by the other party

V.M K. ——— *Order accordingly.*

[END OF VOLUME (1969) 1 M L J (REPORTS)]

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1 Equity Cases 42.